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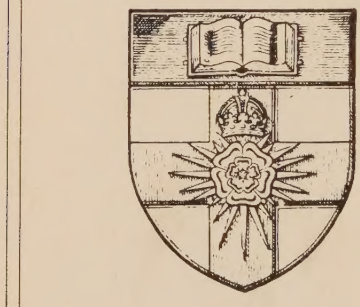

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King's Bench Division.

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CORRIGENDA.

Page 188, line 15 from foot, *for* "Bullinghooke" *read* "Bullingbrooke."
,, 196, line 15, *for* "principal" *read* "principle."
,, 410, line 9, *after* "portion" *insert* semicolon.
,, ,, line 11, *instead of* semicolon *insert* comma.
,, 413, line 11 from foot, *for* "option" *read* "operation."
,, 666, line 14 from foot, *for* "nevertheless" *read* "though the word 'months' meant calendar months."

NOTE.

In Hilary Sittings WILLIAM H. DODD, Esq., His Majesty's third Serjeant-at-Law, was appointed a Judge of the High Court of Justice.

CASES

DETERMINED BY

THE KING'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL,

AND BY

THE COURT FOR CROWN CASES RESERVED.

1907.

WARD *v.* SKEEHAN (1).

(1906. No. 10.)

K. B. Div. Probate. 1906.

June 18.

Practice—Costs, security for—Defendant caveator resident out of the jurisdiction—R. S. C., 1905, *Ord. XXIX., Rr.* 1-3.

A next-of-kin caveator resident abroad may, in a proper case, be ordered to give security for costs, but this cannot be required as a matter of right. Even in a Common Law action there is no inflexible rule that a plaintiff resident abroad must give security for costs.

MOTION.

This was an action brought by Frank Ward, as executor of Owen Carlon, late of Dundalk, in the county of Louth, who died on August 24, 1905, to propound in solemn form a will dated December 21, 1903. The defendant, Mary Skeehan, was next-of-kin of Owen Carlon, and claimed to be a legatee under an earlier

(1) Before ANDREWS, J.

K. B. Div. 1906. WARD v. SKEEHAN.

will than that propounded by the plaintiff. She resided out of the jurisdiction, viz. at Melbourne, Australia. She lodged a caveat on January 6, 1906, which was duly warned by the plaintiff on February 5, 1906, and an appearance entered to the warning on February 12, 1906. The writ was issued on March 1, 1906, and on March 15, 1906, the notice requiring security for costs prescribed by the Rules of the High Court was served, but it was not complied with. The plaintiff, accordingly, instituted a motion applying for an order that the defendant should, within a time to be named by the Court, give such security as the Court might direct to cover the plaintiff's costs of this action; and that in default thereof the caveat entered by the defendant be set aside, and all contentious proceedings in this action be discontinued. Affidavits were made going into the merits of the case, but it is unnecessary to refer to them.

M'Cann, for the plaintiff:—

The Court has jurisdiction to require security from a caveator resident out of the jurisdiction for the costs of an action which she has rendered necessary by appearing to the warning, though according to the present practice she is a defendant: *In the Goods of Twomey*; *O'Leary* v. *Stack* (1); *In the Goods of Roger Flanagan* (2). In ordinary actions a plaintiff resident out of the jurisdiction must give security for costs: *Crozat* v. *Brogden* (3); *Walker* v. *Atkinson* (4); *Dennis* v. *Leinster Paper Co.* (5). The same rule applies here. The only thing required in such actions is an affidavit of merits by the applicant: Order XXIX., Rule 3. If an affidavit of merits is applicable to probate actions, the affidavits here show that the plaintiff has a good case to establish the will.

Donaldson, for the defendants:—

The Court has jurisdiction to order the defendant to give security for costs, but it is discretionary, and not governed by the Common Law rule. In *In the Goods of Twomey*; *O'Leary* v.

(1) [1900] 2 I. R. 564.
(2) 39 I. L. T. R. 188; 5 New Ir. Jur. R. 215, sub nom. *M'Spirit* v. *Flanagan*.
(3) [1894] 2 Q. B. 30.
(4) [1895] 1 I. R. 246.
(5) [1901] 2 I. R. 337.

Stack (1) it was held that a caveator appearing to a warning was not a plaintiff within Order XXIX., Rule 4, which provides that a plaintiff ordinarily resident out of the jurisdiction may be ordered to give security for costs, though he may be temporarily resident within the jurisdiction. *In the Goods of Roger Flanagan* (2) was a peculiar case. There an order was made setting aside a caveat entered by a next-of-kin resident in England, in default of security for costs being given, but the caveator had notice of a suit which had been compromised, and could have intervened. The only case at all like this is *Stewart* v. *Stewart* (3), where a next-of-kin who only desired to cross-examine was not ordered to give security. Here the caveator is a next-of-kin and desires that the will should be proved in solemn form, and there are strong grounds for doubting the capacity of the testator. To grant the application would be a denial of justice.

ANDREWS, J.:—

This was an application that the defendant, a caveator, should give security for the plaintiff's costs of this action, in which the plaintiff, as an executor, propounds an alleged will of one Owen Carlon, deceased, of whom the defendant is one of the next-of-kin. The rule as to security for costs in a probate action is not identical with that which prevails in Common Law actions. A defendant caveator may, in a proper case, be ordered to give security for costs: *Goods of Twomey* (1) and *Lambert* v. *Basset* (4); but this cannot be required as a matter of right. Even in a Common Law action I am unable to agree that there is any inflexible rule that a plaintiff resident abroad must give security for costs. Mr. M'Cann relied on the case of *Crozat* v. *Brogden* (5) in the Court of Appeal in England, in which Lopes, L.J., appears to have held that there was such an inflexible rule, and Davey, L.J., appears to have concurred with him; but Lord Esher, M.R., was not prepared to go so far, and thought that the rule could hardly go that length, and was inclined to think that the Court had a discretion in the matter. I would regret it if the rule were inflexible, and that the

(1) [1900] 2 I. R. 564.
(2) 39 I. L. T. R. 188.
(3) 6 Ir. Jur. (N. S.) 323.
(4) I. R. 11 Eq. 291.
(5) [1894] 2 Q. B. 30.]

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Court had no discretion. With great respect, I think it has a discretion in the matter, which, of course, must be carefully exercised having regard to the facts and circumstances of each particular case; but I cannot regard the order for security for costs as being in every case *ex debito justitiae*. Order XXIX., Rule 1, does not require the Court to grant the application, for which it gives liberty to apply, and on receiving the preliminary notice the recognized practice was that the plaintiff was entitled to an affidavit that the defendant had a defence upon the merits. This practice is confirmed by Rule 3, Order XXIX., and I think it is plainly for the Court to determine whether the affidavit is a satisfactory one. Probate actions, however, are, in material respects, different from Common Law actions. In the latter, generally speaking, the plaintiff and the defendant are the only interested parties. In Probate actions there are many interested parties not directly before the Court. A next-of-kin has a right to require an alleged will of the deceased to be proved *per testes*. The defendant in the present case is a next-of-kin, and she also claims to be a legatee under an earlier will than the will propounded. I cannot on the present application determine upon the merits as between the plaintiff and the defendant, but on the evidence before me I cannot decide that the defendant's action in lodging a caveat, and putting the plaintiff to proof of the will he propounds, is either frivolous or vexatious. I abstain from discussing the merits, lest the trial of the case should be prejudiced thereby; and I shall only add that I regard the case as a proper one for investigation, which I ought not to preclude by making an order against the defendant with which she would, for want of means, be unable to comply. I shall not limit the defendant to a cross-examination of the plaintiff's witnesses under the circumstances of this case; and I must refuse the plaintiff's application for an order that the defendant should give security for the plaintiff's costs of this action. The costs of both parties of this application will be part of their respective costs in the action.

Solicitor for the plaintiff: *Daniel O'Connell.*
Solicitor for the defendant: *Charles J. M'Gahan.*

W. L.

THE KING (SHEAHAN) *v.* THE JUSTICES OF COUNTY CORK (1).

K. B. Div.
1906.
June 19, 26.

*Justices—Summons—Conviction—Negativing exceptions—Using gaff to take fish except as auxiliary to angling, or for purpose of removing fish from a legal weir or box—*13 & 14 *Vict. c.* 88, *s.* 40—*County Officers and Courts (Ireland) Act*, 1877 (40 & 41 *Vict. c.* 56), *s.* 78.

13 & 14 Vict. c. 88, s. 40, enacts that it shall not be lawful, in any fresh-water river or lake, to use, for the purpose of taking fish, any gaff (except when used solely as auxiliary to angling with rod and line, or for the purpose of removing fish from any legal weir or box by the owner or occupier thereof). S. was charged on summons with having used a gaff in a fresh-water river for the purpose of taking fish, and convicted by the Justices at Petty Sessions:—

Held, that the conviction was good, although neither the summons nor the conviction negatived that the use was for a purpose excepted by the section.

Per Gibson, J.: The test to determine whether section 78 of 40 & 41 Vict. c. 56 applies so as to render it unnecessary in a summons to negative exceptions in a statute is, that where a statute makes an act an offence, subject to particular exceptions, &c., which, when applicable, make the *primâ facie* offence an innocent act, such exceptions need not be negatived. But where a statute makes an act, *primâ facie* innocent, an offence when done under certain conditions, words of exception may constitute the gist of the offence, and, in such case, must be negatived.

CERTIORARI.

The prosecutor was charged on summons, on the complaint of Thomas Drohan, before the Justices at Petty Sessions, the complaint as alleged in the summons being "that on the 2nd day of December, 1905, at Ballinamona, on the river Clyda, a fresh-water tributary of the river Blackwater, in No. 4, or Lismore fishery district, ... you the said defendant were found using a gaff for the purpose of taking salmon or other fish contrary to the 13 & 14 Vict. c. 88, s. 40."

The Justices made an order of conviction in the following terms:—"Convicted and ordered to pay a penalty of £4, and for

(1) Before PALLES, C.B., and JOHNSON and GIBSON, JJ.

K. B. Div. 1906.

THE KING (SHEAHAN) *v.* JUSTICES OF CORK.

costs the sum of 2*s.* 6*d.*, to be paid within seven days, one-third of said penalty to be paid to the informants Edward Sweeney and Owen Sullivan, and two-thirds to the conservators of No. 4, or Lismore district; and in default of payment to be imprisoned in Cork male prison for two calendar months unless the said sums are sooner paid."

The prosecutor obtained a conditional order for a writ of *certiorari* on the grounds that the order was bad, inasmuch as it did not negative the exceptions set out in the section under which it purported to have been made; and that the conviction did not disclose any offence within the meaning of the section under which it purported to have been made.

On the hearing before the Justices no objection had been made on behalf of the defendant in the summons to the manner in which the summons was framed. The defence relied on was an *alibi*.

Cause having been shown against the conditional order by Thomas Drohan, the complainant in the summons, the present application was to make the conditional order absolute notwithstanding cause.

The Hon. Cecil Atkinson (with him *Linehan*), for the prosecutor:—

The prosecution is brought under section 40 of 13 & 14 Vict. c. 88, which prohibits the use of a gaff except when "used solely as auxiliary to angling with rod and line or for the purpose of removing fish from any legal weir or box." The words "except when . . . . used solely," &c., though in form an exception, in reality are part of the offence. These words therefore do not constitute such an exception, exemption, &c., as is mentioned in section 78 of 40 & 41 Vict. c. 56; and the conviction is bad, since it does not negative that the gaff was used solely as auxiliary to angling or for the purpose of removing fish from a legal weir or box.

But even assuming that these words do constitute an exception or exemption within the meaning of section 78 of 40 & 41 Vict. c. 56, still the conviction is bad. A conviction on a penal statute must negative any exceptions in the clause creating the offence:

Rex v. *Mallinson* (1); *The King* v. *Jukes* (2); Molloy's Justice of the Peace, pp. 233, 234. The 78th section of 40 & 41 Vict. c. 56 merely dispenses with the necessity of negativing exceptions, &c., in the information or complaint. It is still necessary that they should be negatived in the conviction.

[He also referred to *The Queen* v. *Justices of Wexford* (3); *Smith* v. *Moody* (4).]

Timothy Sullivan (with him *Healy, K.C.*), for Thomas Drohan, the complainant in the summons:—

The conviction is good. The offence is the using of a gaff for the taking of fish. The provision in brackets in the section—"except when . . . used solely," &c.—is an exception within the meaning of section 78 of 40 & 41 Vict. c. 56. The words of that section are of the widest character. The exception, "whether it does or does not accompany the description of the offence complained of," need not be negatived in the summons. The summons here, therefore, is good on its face. If it is not necessary to negative exceptions in the summons, it cannot be necessary to do so in the conviction, since, according to the form of the Petty Sessions Order Book prescribed under the authority of 14 & 15 Vict. c. 93, s. 36, the conviction is based on the cause of complaint as set forth in the summons.

Cur. adv. vult.

June 26.

JOHNSON, J.:—

This is a motion on the part of Sheahan to make absolute a conditional order for a writ of *certiorari* to bring up and quash a summary conviction against him at Petty Sessions for having been found in a fresh-water river (place and time described in the conviction) using a gaff for the purpose of taking salmon or other fish contrary to the 13 & 14 Vict. c. 88, sect. 40. The facts are not disputed. Sheahan's objection to the conviction is that it is bad on its face, inasmuch as it does not negative the exceptions in the statute and section under which it purports to have been made. This is the net matter now for decision. The 13 & 14 Vict.

(1) 2 Bur. 679.
(2) 8 T. R. 536.
(3) [1894] 2 I. R. 81.
(4) [1903] 1 K. B. 56.

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c. 88, sect. 40, enacts under prescribed penalties that "it shall not be lawful in any fresh-water river or lake, at any season of the year, to use for the purpose of taking fish" six enumerated implements, including a gaff, except when a gaff is "used solely as auxiliary to angling with rod and line, or for the purpose of removing fish from any legal weir or box by the owner or occupier."

Prior to the year 1851, in a case of summary jurisdiction at Petty Sessions in Ireland, it was necessary to the validity of a conviction that it should be drawn up with technical formality; and when it came under review, it was strictly scrutinised and examined. The authorities, largely cited at the Bar, are conveniently collected in Paley on Convictions, and I do not stop to refer further to them. In 1851, in the public interest, the Petty Sessions (Ireland) Act, 14 & 15 Vict. c. 93, simplified the proceedings at Petty Sessions, and stripped and freed them largely from technicality. That statute provided (sect. 11) that in cases of summary jurisdiction the summons "shall state shortly the cause of complaint," and sect. 39, "no objection shall be taken or allowed in any proceedings to any . . . summons . . . or other form of procedure under this Act for any alleged defect therein in substance or form." Section 21—"The Justices having heard what each party shall have had to say, and the evidence adduced by each, shall either make such order as shall be authorized by the Act under which the complaint shall be made, or shall dismiss the complaint . . . and the entry of the order so made shall be as follows:—1. One of the Justices then present shall thereupon enter or cause the clerk to enter the particulars of such case and the substance of the decision thereon in a book to be kept for that purpose to be called the 'Order Book,' according to the Form" (now prescribed by the Lord Lieutenant in Council pursuant to the 41 & 42 Vict. c. 69, sect. 11), "and such entry, when one of the Justices present shall have signed his name opposite to it or after it (and which one of the said Justices is hereby required to do), shall be deemed, to all intents and purposes, a conviction."

There is no magic in the words "shall be deemed to be." They simply signify, in popular language, shall be taken and considered to be "a valid conviction to all intents and purposes."

This form of the "Order Book," which is in use in every Petty Sessions in Ireland, and is to be found in every Irish text-book on the subject, compendiously and clearly sets out in distinct columns, with appropriate headings directing how these are to be filled up, all the necessary ingredients of a legal and valid summary conviction at Petty Sessions in Ireland. Column 5 is headed: "Names of Witnesses Examined . . ."; Column 6: "Cause of Complaint as set forth in Summons"; Column 7: "Particulars of Order or Dismissal"; Column 8: "Act under which Order made"; Column 12: "Names of Defendants against whom Order made"; Column 15: "Signature of Justice." An entry in the Order Book, in several columns, duly made and signed, is in Ireland a valid and legal conviction. In addition to the provision in the Petty Sessions Act, sect. 39, that no objection should be allowed to any summons (column 6 of the Order Book) for any alleged defect in substance or form, the 40 & 41 Vict. c. 56 (1877) provided (as several English Acts before and since provided) that "in all cases of summary jurisdiction any exception, exemption, proviso, qualification, or excuse, whether it does or does not accompany the description of the offence complained of, may be proved by the defendant, but need not be specified or negatived in the information or complaint, and if so specified or negatived, no proof in relation to the matters so specified or negatived shall be required from the complainant unless evidence shall be given by the defendant concerning the same." In the present case no evidence was, or was attempted to be, given on behalf of the defendant by way of exception, exemption, qualification, or excuse, of the offence alleged against him. It was not even alleged on his behalf that he was lawfully using the gaff at the place and time in question. The statutes which I have mentioned rendered it unnecessary to negative the use of the gaff as solely auxiliary to angling with rod and line, or removing fish from a legal weir or box by the owner or occupier. The duly signed entry in the Order Book is correct in all its columns. The conviction, therefore, is valid and right. If decided authority is necessary, it will be found in the judgment of Blackburn, J., in *Roberts* v. *Humphreys* (1). For these reasons,

(1) L. R. 8 Q. B. 483, at p. 488.

K. B. Div. 1906. THE KING (SHEAHAN) *v.* JUSTICES OF CORK.

I think the contention for Sheahan is unsustainable. In my opinion, the conditional order should be discharged.

GIBSON, J.:—

This case raises the important question, curiously not covered by authority, What is the effect of section 78 of the Act of 1877, c. 56, providing that in all cases of summary jurisdiction any exception, exemption, proviso, qualification, or excuse, whether it does or does not accompany the description of the offence complained of, may be proved by the defendant, but need not be specified or negatived in the information or complaint, and if so specified or negatived no proof in relation thereto shall be required from the complainant unless evidence shall be given by the defendant concerning the same. A somewhat similar provision as to onus of proof is found in the Petty Sessions Act, 1851, sect. 20, sub-sect. 1. Enactments like sect. 78 as a whole occur in the Prevention of Crime Act, 1871 (34 & 35 Vict. c. 112), sect. 17 (3); the Licensing Act, 1872 (35 & 36 Vict. c. 94), sect. 51, sub-sect. 4; and the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49, sect. 39 (2). The previous rule was that all circumstances of exemption or qualification, whether applying to the offence or the person, that were introduced into, or incorporated by reference with, the enacting clause, must have been distinctly specified and negatived; but that such matters introduced by other distinct clauses or provisoes need not have been so specified or negatived. The statutory enactments above referred to were obviously designed to amend the law in this respect, and the question before us is whether section 78 governs this prosecution and conviction under sect. 40 of 13 & 14 Vict. c. 88. The summons was for using a gaff for the purpose of taking salmon or other fish contrary to 13 & 14 Vict. c. 88, sect. 40. These latter words "contrary to," &c., have no effect if the summons was substantially defective. Section 40 forbids the use, for the purpose of taking fish, of particular well-known poaching implements, including a gaff (except when this latter implement is used for certain limited purposes). This exceptive clause is in brackets. Mr. Atkinson, for the defendant, contends, first, that section 78 does not apply because the clause, though in form an exception, is in substance an essential

part of the offence described; secondly, that if section 78 applies, it is limited to form of complaint and proof, and leaves it necessary to negative the exception in the conviction.

1. The first point is one of some nicety. The section does not authorize the omission of anything which is made an essential constituent part of the offence created and described. The point does not depend on the mere use of the words "except, &c." A prohibition against selling bread except by weight would not authorize a complaint for selling bread *simpliciter*. A summons in that form would show no offence. The test, or dividing line, appears to be this:—Does the statute make the act described an offence subject to particular exceptions, qualifications, &c., which, where applicable, make the *primâ facie* offence an innocent act? Or does the statute make an act, *primâ facie* innocent, an offence when done under certain conditions? In the former case the exception need not be negatived; in the latter, words of exception may constitute the gist of the offence. The question is singularly destitute of direct authority. I can find no case on the statutes of 1871 or 1879. In *Reg.* v. *Antrim Justices* (1) the effect of the statute of 1877 was considered in reference to a prosecution under the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), sect. 23, but the Court did not indicate any opinion or decide the point. On the clause in the Licensing Act there is an important case, *Roberts* v. *Humphreys* (2). There Blackburn, J., dealing with sect. 51, sub-sect. 4 (which is similar to section 78), stated that the section appeared directed to certain decisions of the Common Pleas, holding that, notwithstanding sect. 14 of 11 & 12 Vict. c. 43, in a prosecution under 2 & 3 Vict. c. 47, sect. 42, which prohibited a publican from opening his house for sale of wine, &c., on Sundays before a certain hour for purposes "except refreshment for travellers," the complainant should disprove the exception. *Roberts* v. *Humphreys* (2) was only argued as to onus of proof, the information expressly negativing the exceptions. If section 51, sub-sect. 4, altered the onus of proof, it also appears to make a similar change in the form of complaint. Section 40 of the Fishery Act makes the use of all the specified

(1) [1895] 2 I. R. 603. (2) L. R. 8 Q. B. 483.

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implements illegal, with a limited exception in favour of gaffs when employed for particular purposes. I think, therefore, that section 78 applies, and that the summons was sufficient without negativing the exception. *Reg.* v. *County Dublin Justices* (1), a decision on the Licensing Act, 1872, tends to support my conclusion.

2. If the summons is free from objection, a conviction following and based on it is good. The old form of conviction is replaced by the simple form of Petty Sessions Record which is now sufficient. This is settled law, and is the established practice and course of the Court. One of the last cases referring to the point is *R.* v. *Tyrone Justices* (2). If the conviction was required to state matters which need not be averred in the summons, and which need not be proved by the complainant, the amending legislation would lose most of its utility, and section 78, instead of a benefit, would prove a trap. *Reg.* v. *Dublin Justices* (1) is an authority on this point also.

PALLES, C.B.:—

I have had the advantage of reading the judgment of my brother Gibson, and I entirely concur in it.

Solicitors for the prosecutor: *Dudley & O'Connor.*
Solicitor for Thomas Drohan: *Anthony Carroll.*

J. G. T.

(1) 8 L. R. Ir. 274.

(2) [1906] 2 I. R. at p. 171.

THE KING (ROBINSON) *v.* JUSTICES OF COUNTIES WICKLOW AND DUBLIN (1).

K. B. Div.
1905.
Nov. 23, 24.
1906.
Jan. 23.

Justices—Summary conviction—"Penalties, including costs"—Small Penalties (Ireland) Act, 1873 (36 & 37 *Vict. c.* 82), *ss.* 3, 4, 6.

The word "penalty" in section 4 of the Small Penalties (Ireland) Act, 1873, means the aggregate amount of the penalty, strictly so called, and the costs. At least, *per* Lord O'Brien, L.C.J., where the incorporation of costs with the penalty, strictly so called, does not produce an aggregate sum exceeding £5.

R. was summarily convicted by Justices at Petty Sessions, and ordered to pay, for fine, £3, and, for costs, 5*s.* 6*d.*, or, in default of payment, to be imprisoned for two months, unless said sums sooner paid:—

Held, that the conviction was good.

The Queen (*Herbert*) v. *Justices of Kildare* ([1895] 2 I. R. 577) considered.

CERTIORARI.

The prosecutor was charged on summons on the complaint of District-Inspector Winder and Acting-Sergeant Cooper, Royal Irish Constabulary, before the Justices at Petty Sessions, under sect. 1 of the Motor Car Act, 1903 (3 Edw. 7, c. 36), for that, being the driver of a motor-car, he drove the said motor-car recklessly on the public highway, contrary to law. He was convicted, and an order was made by the Justices to the following effect:—"Convicted and ordered to pay for fine the sum of £3, and for costs the sum of 5*s.* 6*d.*, or in default of payment forthwith to be imprisoned in Kilmainham Jail for the period of two months, without hard labour, unless said sums are sooner paid. Conviction to be recorded on license."

The prosecutor obtained a conditional order for a writ of *certiorari* to quash the conviction on the ground that the order was bad on its face, inasmuch as it ordered imprisonment in default of payment of costs.

The complainants in the Court below now applied to have the conditional order discharged.

(1) Before LORD O'BRIEN, L.C.J., and ANDREWS and BOYD, JJ.

K. B. Div. 1905.

THE KING (ROBINSON) v. JUSTICES OF WICKLOW AND DUBLIN.

The Solicitor-General (*Campbell, K.C.*) and *Cecil Atkinson*, for the complainants in the Court below.

W. G. Gibson, for the prosecutor herein.

1906. Jan. 23.

LORD O'BRIEN, L.C.J. :—

On summary procedure, that is to say, under the procedure prescribed by the Petty Sessions Act, the defendant in the summons was convicted, and ordered to pay for fine the sum of £3, and for costs the sum of 5*s.* 6*d.*, and in default of payment forthwith to be imprisoned in Kilmainham Jail for the period of two months, without hard labour, unless said sums were sooner paid. No order was made for distress. Was this order valid? That is the question we have to determine.

The meaning of the expression "penalties including costs" in the 6th section of the Small Penalties Act is certainly obscure. However, it appears to me that, having regard to the definition in the 3rd section, and to the word "including" in the 6th section, the expression "penalties including costs" means "penalties and costs," so long, at least, as the incorporation of costs with the penalty, strictly so called, does not produce an aggregate sum exceeding £5. It is provided by the 3rd section of the Small Penalties Act that the word "penalty" shall include any sum of money recoverable in a summary manner, and costs are recoverable by summary procedure (see the 9th sub-section of the 22nd section of the Petty Sessions Act). Having regard to the 3rd, 4th, and 6th sections of the Small Penalties Act, the amount of the penalty, strictly so described, and the amount of the costs, if any, can, in my opinion, be bulked so as to constitute one penal sum, as in this case, where the aggregate of the sums adjudged for penalty and costs does not exceed the maximum limit under the Small Penalties Act, that is to say, the sum of £5.

It is not necessary for the purpose of the decision of this case to say what would be the result if the amount of the penalty, strictly so called, and of the costs exceeds the sum of £5—whether, in that event, the case would be altogether outside the Small Penalties Act—whether, in that case, the expression

in the Small Penalties Act itself, "penalties including costs," has the result of taking the case out of the Small Penalties Act—whether the Act ousts, so to speak, its own application in a case where the penalty, strictly so called, is £5, and the costs sixpence—whether in that case it is imperative to add costs to penalty, though so doing renders the Act inapplicable. If I were to speculate, I should think this was not intended to be done; but then there is the expression "penalties including costs." In the present case the aggregate sum being under £5, and the obligation to order a distress being dispensed with by the 4th section of the Small Penalties Act, I am of opinion the decision of the magistrates cannot be impeached as invalid.

As the facts of this case are not identical with the facts in the case of *The Queen* (*Herbert*) v. *The Justices of Kildare* (1), I do not think it necessary to review the decision in that case. If it is to be reviewed (there being no appeal in a criminal case), this must be done, according to our practice, by all the Judges of the King's Bench Division, or by such of them as are able to attend after notice to them all.

ANDREWS, J.:—

The conviction in this case which we are asked to quash was made under the Act of 3 Edw. 7, c. 36, sect. 1, sub-sect. (1), for the reckless driving of a motor-car on a public highway, which is made an offence by that Act, and by sect. 11, sub-sect. (1), a person guilty of an offence under that Act, for which no special penalty is provided (which is the present case), is made liable on summary conviction to a fine not exceeding £20.

The summary jurisdiction over this offence is that provided by the 22nd section of the Petty Sessions (Ireland) Act (14 & 15 Vict. c. 93).

By the conviction in question the offender was "ordered to pay for fine the sum of £3, and for costs the sum of 5*s.* 6*d.*, or in default of payment forthwith to be imprisoned in Kilmainham Jail for the period of two months, without hard labour, unless said sums are sooner paid, conviction to be recorded on license."

(1) [1895] 2 I. R. 577.

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Andrews, J.

The specific objections to this conviction, as stated in the conditional order for the issue of a writ of *certiorari*, are that it directed imprisonment in default of payment of costs, and that it was not pronounced in open Court. The latter objection was abandoned, being (as I understood to be admitted) contrary to the fact. No order was made, pursuant to sub-section 2 of the 22nd section of the Petty Sessions Act, for distress in default of payment; and it was argued before us that such order, or a sufficient reason for not making it, is a condition precedent to the order for imprisonment, having regard to the provisions of the 3rd sub-section, that in every case of an offence where the Justices shall order that a distress shall be made in default of payment of any penal sum they may order that in default of payment the person against whom the order shall be made shall be imprisoned for any term not exceeding the period specified in the scale therein set forth; but if the said person shall admit, or it shall be otherwise proved on oath, that he has no goods, or that a distress would be ruinous to him or his family, the Justices may order such person to be imprisoned, in the first instance, for the like period for which he might be imprisoned in default of distress.

Although these provisions are not as clear as they might be, I think it sufficiently appears from them that under the Petty Sessions Act an order for distress, or a sufficient reason for not making it, is a condition precedent to the order for imprisonment; but the Small Penalties (Ireland) Act, 1873 (36 & 37 Vict. c. 82), adopting this construction, expressly enacts by its 4th section that where, upon summary conviction, any offender is adjudged to pay a penalty not exceeding £5 (which is the present case, whether the word "penalty" in that Act does or does not include costs), such offender, in case of non-payment thereof, may, without any warrant of distress, be committed to prison for any period not exceeding the period specified in the scale which is given in that section (within which the period of imprisonment in the present case comes), unless the penalty shall be sooner paid. The objection, therefore, founded on the absence of a distress order, or a sufficient excuse for not making it, in the present case is thus removed.

Now, as regards the objection to the conviction that it directed imprisonment in default of payment of costs, this case is within

the Small Penalties (Ireland) Act, 1873, for the "penalty" in this case, even if the word "penalty" in and throughout the Act of 1873 includes costs, does not exceed £5. It amounts, including costs, to £3 5*s.* 6*d.*, and the period, in the conviction, of two months imprisonment is correct according to the scale given in the 4th section of that Act. Having regard to the 3rd, 4th, and 6th sections of that Act, I am of opinion that the word "penalty," in and throughout the Act, means the penal sum and the costs adjudged to be paid by the offender, that is, the total amount of both; and, upon this construction of the word "penalty" in the Act of 1873, the conviction in this case, having regard to the 4th section, properly directs imprisonment for that which constitutes the "penalty," namely, the penal sum (£3) and the costs (5*s.* 6*d.*), and the objection in question therefore fails. Independently of this, however, I think that in cases within the Act of 1873 the procedure under the 22nd section of the Petty Sessions Act remains in force, save in so far as it is altered by the Act of 1873, and the 3rd sub-section of the 22nd section enacts that the imprisonment thereunder shall be determinable on the payment of the penal sum and costs, and any costs of the distress if made, and, having regard to this provision in the Petty Sessions Act, I think the objection equally fails.

The Queen (*Herbert*) v. *Justices of Kildare* (1) was a different case from the present one. The conditional order was discharged in that case, but the two propositions which appear to have been decided by Mr. Justice O'Brien were (1), that costs cannot be added to the penal sum so as to authorize increased imprisonment beyond what could be ordered in respect of the penal sum alone; and (2), that the application of the Small Penalties Act is to be determined having regard to the amount of the penal sum alone.

I confess I feel some difficulty in following the reasoning in the judgment of Mr. Justice O'Brien in *Herbert's Case* (1). His construction of the word "penalty" in the Act of 1873 appears to differ from the construction of it which I adopt, but the propositions which I have referred to as having been decided by him do not

(1) [1895] 2 I. R. 577.

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appear to me to affect the present case, or conflict with the decision I have arrived at, namely, that the conviction in this case was within the jurisdiction of the Justices, and is a valid conviction, and that the conditional order ought, therefore, to be discharged.

BOYD, J., concurred (1).

Solicitor for the prosecutor: *A. Lane Joynt.*
Solicitor for the complainants in the Court below: *Sir P. Coll.*

J. G. T.

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Nov. 13, 14. 1906. Jan. 23.

THE KING (HASTINGS) *v.* JUSTICES OF COUNTY GALWAY (2).

Justices—Summary conviction—"Penalties, including costs"—Small Penalties (Ireland) Act, 1873 (36 & 37 *Vict. c.* 82), *ss.* 3, 4, 6—*Case stated by Justices—Direction, Justices shall re-hear and convict—Procedure to have case re-heard.*

The word "penalty" in section 4 of the Small Penalties (Ireland) Act, 1873, means the aggregate amount of the penalty, strictly so called, and the costs. At least, *per* Lord O'Brien, L.C.J., where the incorporation of costs with the penalty, strictly so called, does not produce an aggregate sum exceeding £5.

H. was summarily convicted by Justices at Petty Sessions, and ordered to pay, for fine, 10*s.*, and, for costs, 1*s.* 6*d.*, or, in default of payment, to be imprisoned for seven days, unless said sums sooner paid:—

Held, that the conviction was good.

The Queen (*Herbert*) v. *Justices of Kildare* ([1895] 2 I. R. 577) disapproved of by Wright, J.

On a case stated by Justices, the Court adjudged that the Justices were wrong in point of law in dismissing the complaint, and that they should re-hear and convict the defendant. Thereupon the complainant served the order on both Justices and defendant, and served notice on the defendant that an application would, on a particular day, be made to the Justices to re-hear the complaint:—

Held, that such services were sufficient to bring the defendant again before the Justices, and that a conviction following thereon was good.

(1) See also the next case.

(2) Before LORD O'BRIEN, L.C.J., and MADDEN and WRIGHT, JJ.

AT a Petty Sessions held for the Petty Sessions district of Ballinasloe, in the county of Galway, the prosecutor, William Hastings, was charged on summons, on the complaint of Nicholas O'Carroll, for that he did, on the 23rd January, 1905, act as a member of the Council of the Ballinasloe Urban District when disqualified by reason of being concerned in a contract with the Urban District Council for "printing," contrary to the provision of the Local Government (Application of Enactments) Order, 1898. Upon the hearing of the complaint, the magistrates dismissed the summons on the merits; but, upon the application of the complainant, agreed to state a case for the opinion of the King's Bench Division. The case was argued in the King's Bench Division under the title of *O'Carroll* v. *Hastings* (1), and on the 18th May, 1905, an order was made adjudging that the magistrates were not correct in point of law in dismissing the complaint, and that they should re-hear and convict the defendant. The complainant's solicitor, on the 29th May, 1905, served the Justices through their clerk with the order of the King's Bench Division, and at the same time served the prosecutor with a copy of same, and with notice that an application would be made to the magistrates to re-hear the complaint on Saturday, the 3rd June, 1905. The case was accordingly listed for hearing before the magistrates at Ballinasloe on Saturday, the 3rd June, and when the case was called on a son of the prosecutor appeared and asked for an adjournment on the ground that the prosecutor was absent in Dublin attending to the lodging of a notice of appeal against the order of the King's Bench Division. A letter from the prosecutor to the magistrates to the same effect was read in Court. Complainant's solicitor objected to any adjournment on the grounds that no appeal lay in the case, and that the reason alleged for the prosecutor's absence in Dublin was not *bonâ fide*. Under these circumstances the magistrates decided to re-hear the case, and thereupon they convicted the prosecutor and ordered him "to pay forthwith, for fine, the sum of 10*s.*, and for costs, the sum of 1*s.* 6*d.*; and in default of payment the defendant to be imprisoned in the gaol at Galway for the period of seven days without hard labour, unless said sums be sooner paid."

(1) [1905] 2 I. R. 590.

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The prosecutor obtained a conditional order for *certiorari* on the 11th October, 1905, to quash the conviction on the grounds, amongst others, that the imprisonment mentioned in the order in default of payment of the fine and costs was punishment which the magistrate had no jurisdiction to impose, and that when the conviction was made on the 3rd June the case was not properly before the Court, and the Court had no jurisdiction to proceed with the case on that day in the defendant's absence, and that the complainant's solicitor had no right to bring the case on peremptorily on that day.

Bartley, for the prosecutor.

H. Mac Dermot, for the complainant in the summons.

1906. Jan. 23.

LORD O'BRIEN, L.C.J.:—

This case, so far as the principal question involved is concerned, is covered by my judgment in *The King* (*Robinson*) v. *The Justices of Counties Wicklow and Dublin* (1). As regards the other point, viz., whether there was jurisdiction to hear the case on this particular day, we are all of opinion that the magistrates had perfect jurisdiction, and we think that they exercised it rightly.

MADDEN, J.:—

In construing the Small Penalties Act of 1873, we must have regard to the state of the law when it was passed, and to the mischief which it was intended to remedy. The provisions for the enforcement of penalties awarded by Justices are contained in the 22nd section of the Petty Sessions Act. They are empowered to order that in default of the sum awarded being paid at the time and in the manner directed by their order, the goods of the person against whom the said order shall be made "shall be distrained for such sum, or for so much of such sum as shall remain unpaid at the time fixed, and also for the costs of such distress." This sub-section includes sums awarded other than penalties. The 3rd sub-section applies only to penalties, and empowers the Justices when a distress is made in default of pay-

(1) *Ante*, p. 14.

ment of any penal sum, to order "that in default of the said sum being paid as directed, the said person shall be imprisoned for any term not exceeding the period specified in" the statutory scale. The scale is calculated on the amount of the penalty, but the imprisonment is only "determinable upon payment of the said sum (*i.e.* the penalty) and costs, and any costs of the distress, when a distress shall have been made."

The 9th sub-section enables the Justices to award to the complainant, or to the defendant, as the case may be, such sum, not exceeding twenty shillings, for costs as to such Justices shall seem meet, "and the same shall be recoverable in the same manner as any penalty or other sum adjudged to be paid by the Justices."

Costs awarded to a complainant will be added to the penalty, not in the calculation of the term of imprisonment, which is based on the penalty alone, but in this sense, that release from imprisonment before the expiration of the term so calculated cannot be obtained except by payment, not alone of penalty, but of costs, including costs of distress.

Costs adjudged to either complainant or defendant are recoverable "in the same manner as a penalty or other sum adjudged to be paid," that is to say, by distress warrant under sub-section 2. The provisions of sub-section 3 are, as I have mentioned, applicable only to penalties, and there are no provisions in the section enabling an award of costs to a defendant to be enforced by means of imprisonment.

Imprisonment for costs, under this statute, exists only in this form; where a definite term has been imposed, proportioned to the penalty, this term cannot be determined by payment of the penalty only, but as a term of release from the punishment imposed reparation must be made by payment of costs; but costs are in no case taken into account in fixing the term of imprisonment.

Having ascertained the position of an award of costs, in regard to imprisonment under the principal Act, I turn to the amending statute, 36 & 37 Vict. c. 82. The purpose of the Legislature is shown by its title, and by its recital. It is to substitute for the provisions which I quoted a simpler procedure, adapted to the case of small penalties. This is carried out *first* by dispensing with the warrant of distress required by the principal Act, and

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Madden, J.

secondly, by revising the scale of imprisonment in cases to which the Act applies, and the question for our decision is, whether the simplification of procedure in small cases has not been carried out in a *third* manner, that is to say, by abolishing the distinction between penalty and costs, and including both under the term "penalty" for all the purposes of the Act.

This has been certainly done for the purpose of ascertaining the application of the Act. The 6th section provides that the Act "shall apply to penalties, including costs, recoverable in a summary manner." In determining whether a case comes within the statute, costs are added to penalty, and if the sum-total exceeds £5 the Act does not apply. This was so decided in *Herbert's Case* (1). I am aware that a wider question was discussed by O'Brien, J., in delivering the judgment of the Court, and the marginal note to the report, not unnaturally, interprets the decision as establishing the wider proposition. But when the facts are examined, the *res judicata* appears to be precisely what I have stated. It is consistent with our judgment in the present case, and I willingly concur with the other members of the Court in limiting the binding authority of this case to the precise point which called for decision.

Starting then with the proposition that penalty, as interpreted by the earlier words of the 6th section, includes costs, and finding the same word "penalty" employed in the concluding portion of the same section, I am bound, acting on a settled rule of construction, to attribute to it the same meaning throughout, in the absence of coercive reasons to the contrary. The section repeals "all provisions of any Act of Parliament authorizing in the case of non-payment of a penalty not exceeding £5, a longer term of imprisonment than is provided by this Act." If "penalty" in these words is to have the same meaning as in the earlier part of the section, it includes costs, and costs as well as penalty proper. Costs are to be added to penalty proper, for the purpose of fixing the term of imprisonment.

Is there any reason why the same meaning should not be attributed to the same word in the 4th section? It would be strange if it were to be used in a different sense in the

(1) [1895] 2 I. R. 577.

section fixing the maximum term, and that regulating the scale, of imprisonment. But apart from this consideration, the provision authorizing imprisonment for the specified term "unless the penalty shall be sooner paid," affords a strong and independent argument in favour of the view that penalty in this section includes costs. These are the words with which we are immediately concerned. Under the Petty Sessions Act, as I have pointed out, release can only be obtained by paying penalty and costs. These provisions, being consequential on distress, are not applicable to the small penalties for which a distinct system of enforcement is substituted. Unless "penalty" includes costs, a prisoner could obtain release under the Small Penalties Act without discharging the obligation which was considered reasonable in proceedings under the Petty Sessions Act—a result which could hardly have been intended.

No doubt, if this construction be adopted, costs are taken into account in fixing the scale of punishment. But this seems necessarily to follow from the language used by the Legislature, and there is nothing startling in the result. For it is precisely what was done in somewhat clearer terms by the Licensing Act of 1872 (35 & 36 Vict. c. 94), sect. 51, in regard of offences under the Act. For these reasons, I think that the order before us is valid.

WRIGHT, J.:—

Under the Petty Sessions Act (14 & 15 Vict. c. 93, sect. 22, sub-sect. 2) in all cases of summary jurisdiction the Justices at Petty Sessions, in every case where they shall award any penal sum to be paid, may order that, in default of payment of such sum, the goods of the person against whom the order shall be made shall be distrained for such sum or so much thereof as shall remain unpaid, and also for the costs of such distress. By sub-sect. 3, where a distress order has been made in default of payment of any penal sum, an order may be made by the Justices against the defendant that in default of payment he be imprisoned for any term not exceeding the period specified in the scale set out in the section, and where such order has been made, and under it the defendant has been imprisoned, the imprisonment is made determinable upon payment of "the said sum," *i.e.*, penal sum,

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"and costs, and any costs of the distress, where a distress shall have been made." By sub-sect. 9 of the same section 22 the Justices have power to award for costs such sum, not exceeding twenty shillings, as they shall think fit, and the costs awarded are made recoverable in the same manner as any penalty or other sum adjudged by the Justices to be paid. Accordingly, under this Act, an order for imprisonment must be preceded by an order for distress, and, once the defendant was put in prison under such order, the term of imprisonment could only be determined on payment of the penal sum and all costs, not merely costs awarded by the Justices, but also costs of a distress, where a distress had been made.

In the Petty Sessions Act penalty or penal sum is clearly distinguished from the costs awarded, and the length of the term of imprisonment in default of payment is regulated by the amount of the penalty or penal sum, exclusive of the amount of the costs; but once the defendant is imprisoned, after an ineffectual attempt to realise penalty and costs by distress, he can only be relieved from serving the term of imprisonment by payment of penalty *and costs*.

The Small Penalties (Ireland) Act, 1873 (36 & 37 Vict. c. 82), was passed with the express object of amending the law relating to small penalties in Ireland. The Act is very short, consisting practically of only six sections. Shortly speaking, it dispenses with the necessity of a distress warrant in all cases where the penalty awarded does not exceed £5, and it revises the terms of imprisonment which may be ordered for default of payment. By section 2 of the Act "penalty" is defined as including any sum of money recoverable in a summary manner. By section 6 the Act is declared to apply to penalties, *including costs*, recoverable in a summary manner, in pursuance of any Act of Parliament, whether passed before or after the commencement of that Act. Section 4 abolishes the warrant of distress as a necessary antecedent to an order for committal to prison, and declares that the offender shall be committed to prison for the term specified in the scale, "unless the penalty shall be sooner paid."

The order made in the present case is—"Defendant convicted . . . and ordered to pay forthwith, for fine, the sum of 10*s*., and,

for costs, the sum of 1*s.* 6*d.*: in default of payment defendant to be imprisoned in the gaol at Galway for the period of seven days without hard labour, unless said sums be sooner paid." The order has been attacked mainly for the concluding words "unless the said sums" (*i.e.* 10*s.* fine and 1*s.* 6*d.* costs) "be sooner paid." This order undoubtedly conforms to the principle embodied in the Petty Sessions Act, sect. 22, sub-sect. 3, which makes the imprisonment determinable upon payment of the penalty and costs. The main object of the Small Penalties Act was, in my opinion, as already pointed out, to simplify procedure by abolishing, in cases of small penalties not over £5, the warrant of distress as a necessary preliminary to a committal order; but it is also, in my opinion, wholly outside the language and intention of the Act to change the effect and operation of the committal order, once made. Having regard to the language of sect. 2, that penalty shall include any sum of money recoverable in a summary manner, and of sect. 6, that the Act shall apply to penalties, including costs, recoverable in a summary manner, I am of opinion that where the word "penalty" is used in the concluding words of sect. 4 ("unless the penalty shall be sooner paid"), it means penalty including costs, and that a defendant against whom such an order is made cannot escape from serving the full term of imprisonment, except on the terms of paying both sums, penalty and costs.

I am, therefore, of opinion that the order in the present case is right, and that the application to quash it ought to be refused; and it will be observed, in the case of the order in this case, that, whether penalty includes or excludes costs, the term of imprisonment imposed is not in excess of the statutory scale.

This, according to my judgment, is sufficient to dispose of the case.

But a question has been raised and argued as to what is the meaning of "penalty" all through the Act (36 & 37 Vict. c. 82). Does it include or exclude costs for all purposes, particularly for the purpose of fixing the amount, by reference to which the term of imprisonment is to be regulated? The word "penalty," in my opinion, all through this short Act of Parliament, which defines, or purports to define, it, has the same meaning, namely, it is the aggregate of the penal sum, strictly so called, and costs. To

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attribute to it one meaning in one part of the section, and a different meaning in another part, would be a strong proposition, and one for which, neither in the language used nor in the general policy of the Act, is there any justification—nor in so holding do I attribute to the statute any novel or startling result—and, as pointed out by my brother Madden, the precise result is worked out, though in different and less ambiguous language, by sect. 51 of the Licensing Act of 1872 (35 & 36 Vict. c. 94)—an Act passed in the previous year—where penalty is expressly made to include costs, and the scale of imprisonment is regulated by the amount of the penalty, *i.e.* penal sum and costs.

This opinion of mine as to the general meaning of the word "penalty" in the Small Penalties Act is not necessary to my decision in the present case; but as the question has been discussed, and is dealt with in some of the judgments that have been just delivered, I have thought it right to state it.

It follows that I am not satisfied with the decision of *The Queen* (*Herbert*) v. *The Justices of Kildare* (1).

Solicitor for the prosecutor: *Hutchinson Davidson.*
Solicitor for the complainant: *Patrick Golding.*

J. L.

(1) [1895] 2 I. R. 577.

W. D. PEARSON & SON, LTD., *v.* THE LORD MAYOR, ALDERMEN, AND BURGESSES OF THE CITY OF DUBLIN (1).

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1906.
Jan. 30, 31.
Feb. 1, 27.

Appeal.
May 14–17.
June 26.

Contract—Actionable deceit—Representations made without real knowledge or belief—Representations not intended to be solely acted on—Provision as to verification by contractor of matters which could influence tender—Damage resulting from fraudulent misrepresentation—Reckless negligence in statement not amounting to deceit—Public Authorities' Protection Act, 1893.

Plaintiffs contracted to execute certain sewage outfall works for the Dublin Corporation. In the contract plaintiffs covenanted to execute the works described in the drawings and specification according to the drawings, specification, conditions, and bill of quantities, and the Corporation covenanted to pay for the works on the receipt of the certificate in writing of their engineer, as provided by the conditions. The specification provided, among other things—(4) That the drawings and specification were to be considered explanatory of each other, and any discrepancies should be explained by the engineer; (5) that the contractor should sink trial-holes, &c., and set out and keep correct the works; (38) provisions as to the engineer's certificate of completion; (39) that all disputes as to the works, the construction of the contract, &c., were to be referred to the engineer, whose decision should be final, other differences to be referred to arbitration; (43) that the contractor was to satisfy himself as to the levels, character, and nature of all existing works, &c., of the nature of the strata, &c., and was to obtain his own information on all matters which could in any way influence his tender; no charge for extra work, or otherwise, was to be allowed in consequence of any incorrect information or inaccuracies in the drawings, specification, or estimate of quantities; (46) the contractor was to verify for himself the particulars of existing matters shown on the drawings; (48) that the information given as to existing walls, &c., was given as the best in the possession of the Corporation, but the Corporation did not hold itself in any way responsible for its accuracy.

When the works were completed, plaintiffs claimed a sum of £36,574 from the Corporation, on the grounds—(1) that the plans showed a certain existing wall, extending 9 feet below the Ordnance datum line, which could be utilised for the purposes of the works; that this wall did not exist as shown, and that consequently the plans for the works had been altered, and plaintiffs, at the direction of the engineer, had completed the works at this extra cost; (2) that

(1) In the King's Bench Division, before LORD O'BRIEN, L.C.J., and GIBSON, BOYD, and WRIGHT, JJ.

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the Corporation had fraudulently misrepresented the structure and existence of this wall, and had thereby induced plaintiffs to enter into the contract, to their detriment. As to the counts in contract, the Corporation relied on the absence of a certificate from their engineer, and as to the count in deceit, they relied on the conditions of the specification, and denied the making of any representation and any fraud. They further pleaded that the action was not brought within the time limited by the Public Authorities' Protection Act, 1893. Plaintiffs replied that the certificate was withheld by the engineer fraudulently and in collusion with the defendants. As to this, the Corporation rejoined, denying fraud and collusion, and relying on clause 38 of the specification; and no evidence to sustain the reply was offered at the trial:—

Held, that the claim on contract must fail in the absence of a certificate.

Held, also, that the Public Authorities' Protection Act, 1893 (56 & 57 Vict. c. 61), did not apply.

Held, also, by the Court of Appeal (reversing the judgment of the King's Bench Division, from which Lord O'Brien, L.C.J., dissented), that clauses 4 and 43 of the specification showed that the representations were not intended to be acted on, and that consequently (there being no wilful misrepresentation) there was no fraud.

ON October 7th, 1899, the plaintiffs contracted with the Dublin Corporation to construct a high-level outfall sewer and outfall works for the sum of £94,003 14*s.* 9*d.* The contractors covenanted to "perform and execute, in a good and workmanlike manner, and to the satisfaction of the engineer," the works described in the drawings and the specification, according to the conditions, specification, and bill of quantities, subject to penalties for non-completion within the specified or extended time. The Corporation agreed to pay the contractors from time to time on receiving the certificates, in writing, of the engineer, and according to the terms contained in the general conditions in the specification. The material clauses in the specification were as follows:—

"(4) The drawings referred to, and this specification, are to be considered as explanatory of each other, and should anything appear in the one that is not described in the other, no advantage shall be taken of any such omission, the contractor having so considered them in forming his estimate. Should any discrepancies, however, appear, or should any misunderstanding arise as to the meaning and import of the specification, or drawings, or about the quality or dimensions of the materials, or about the due and proper execution of the works, or as to the measurement or

quality and valuation of the works executed under the contract, or as extras thereupon or deductions therefrom, or as to any matter or thing whatsoever arising out of the contract, the same shall be explained and decided by the engineer, and his explanation and decision shall be final and binding upon the contractor, and the contractor shall execute the works according to such explanation and decision, without charge, deduction from, or addition to this contract.

"(5) The contractor shall, at his own expense, sink all trial holes, make all borings, and dig such trenches as the engineer may consider necessary for ascertaining the strata or nature of the ground, and the exact position and levels of existing works, and shall set out and keep correct the works in every particular, according to the drawings referred to, or any other that may be supplied to him, or the directions that he may receive from time to time, and be held responsible for the correctness of the same throughout the whole term of the contract, and for this purpose a competent person or persons shall be employed by the contractor."

(38) [After provisions in respect of provisional payments and retention-money] "at a period of three calendar months after the complete delivery of the works, and on the engineer's certificate in writing of the completion of such works to his satisfaction, and provided that within such period of three months the contractor shall have delivered to the engineer a full account, in detail, of the claims he has on the said Corporation in respect of such works, and that the engineer shall have given a certificate in writing of the correctness of such claims, a further sum of 5 per cent. shall be paid to the contractor . . . Provided also that no sum of money shall be considered to be due and owing, nor shall the contractor make any claim against, or demand upon, the Corporation for, or on account of, any work executed by him, unless the engineer shall certify the amount thereof, and that the contractor be reasonably entitled thereto."

"(39) In case of disputes or differences arising touching the works or the construction of the contract, or measurements, or materials, or matter of any character whatever, or concerning any certificate, order, or award, which may be made by the engineer, such dispute or difference shall be referred to, and decided by, the engineer, it being expressly understood that such decision of the

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engineer is to be final and without appeal. Moreover, it shall not be competent to the contractor or the Corporation, at law or in equity, to take exception to any hearing before, or determination of, the engineer in such disputes and differences. If, however, any difference arise touching matters other than those which are herein defined to be decided by the engineer, such differences shall be referred to arbitration."

"(43) The contractor is to satisfy himself as to the dimensions, levels, character, and nature of all existing works, buildings, roads, lands, waterways, sewers, pipes, the nature of the strata through which the excavations are to be made, and all other things, so far as they may have any connexion with the works in the contract, and is to obtain his own information on all matters which can in any way influence his tender. He is also to check the estimate of quantities, and satisfy himself as to its accuracy and sufficiency, and the contractor is at liberty to alter or add to the same, if he consider necessary, before sending in his bill of quantities as specified above (clause 42). Any alteration, however, made to the specification or to the schedule of prices will vitiate the tender. No charges for extra work or otherwise will be allowed in consequence of any incorrect information or inaccuracies which may appear in the drawings, specifications, or estimate of quantities. No allowance will be made on account of excavating in rock or other difficult ground, or of unforeseen difficulties of any kind."

"(46) The contractor is to verify for himself the levels from which the sections of the ground are made, as well as all other particulars of existing matters shown on the contract drawings."

"(47) The information on the contract drawings and on the loose sheet accompanying the estimate of quantities about the tides is given as the best in the possession of the Corporation; but the Corporation does not hold itself in any way responsible for its accuracy."

"(48) The information as to the cross-sections and foundations of existing walls and works, and the nature of the ground inside the Pigeon-house harbour, on the contract drawings Nos. 8, 9, and 10, is given as the best in the possession of the Corporation; but

the Corporation does not hold itself in any way responsible for its accuracy."

The drawings represented a wall known as the north harbour wall as extending for a depth of 9 feet below the Ordnance datum line. If it had done so, it would, at least after certain specified work had been done upon it, have acted as an efficient coffer dam to keep out water from the works. During the progress of the works it was discovered that this wall in fact rested on the mud, and did not extend below the Ordnance datum line at all. When this fact was discovered, the plan of the works had to be altered, as mentioned hereafter in the several judgments, and an arrangement was entered into for the completion of the works on this new basis. Some time after this new arrangement had been made, the plaintiffs came to the conclusion that at the time of the original contract the Corporation had not had any information which could reasonably justify their assumption with regard to this north harbour wall. The contractors now claimed the sum of £36,374 from the Corporation on account of the additional expense to which they had been put thereby. They claimed this sum—(1) as money to which they were entitled under their contract, and (2) as damages for fraudulent misrepresentations made with reference to the north harbour wall.

As regards the claim in contract, the defendants pleaded the absence of any certificate from the engineer, and relied on clause 38 of the specification. Although the plaintiffs replied that the certificate was withheld by the engineer fraudulently and in collusion with the defendants, no evidence was given at the trial in support of this reply.

As regards the claim for damages for deceit, the eighth paragraph of the statement of claim was as follows:—"In order to induce the plaintiffs to enter into the said contract, the defendants, well knowing the same to be untrue, or with a reckless disregard whether the same were true or false, falsely represented (1) that the structure and position of the said north harbour wall, and its foundations, were correctly shown on said plans, and that the foundations of said wall existed to the depth shown on said plans; (2) that the said wall and its foundations were of a nature and structure adequate for excluding the tidal waters of said river, and

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for enabling plaintiffs to construct such outfall works without difficulty; and (3) that the defendants had in their possession information as to the structure, nature, and position of the said wall and its foundations, and the plaintiffs were by such representations induced to enter into said contract. . . ." The paragraph concluding with an averment as to the falsity of such representations, and an allegation of the consequential damage suffered by the plaintiffs thereby.

To this the defendants pleaded, denying fraud, and relying on clauses 4 and 43 of the specification as showing that any representations made in the drawings were not intended to be acted upon. The defendants further relied upon the provisions of the Public Authorities' Protection Act, 1893, as affording them a defence to the action.

The action was tried before Palles, C.B., and a special jury, on October 26th, 27th, and 30th, 1906.

The nature of the evidence produced appears sufficiently from the several judgments. On the close of the plaintiffs' case, counsel for the defendants applied to His Lordship to direct a verdict for the defendants on the following grounds:—

(*a*) As to the causes of action in contract, because of the absence of a certificate.

(*b*) As to the causes of action for deceit on the grounds—

(1) That the Public Authorities' Protection Act was, in itself, an answer to the claim.

(2) That there was not any evidence of any such representations by the defendants as were relied on by the plaintiffs.

(3) That article 4 of the specification provided that the drawings and specification were to be considered as explanatory of each other, and that, consequently, the specification was capable of qualifying the drawings, and that article 43 of the specification showed that any representation which could be taken to have been made by the drawings was not intended by the defendants to be acted upon, and could not be made the foundation of an action for fraud.

(4) That as the plaintiffs had entered into a new contract to execute the works for which the £36,374 was now claimed, and as the price fixed by that contract had been paid, there was no evidence that the plaintiffs had sustained any damage by reason of the alleged representations.

The Chief Baron directed a verdict for the defendants.

As to the cause of action in contract, his Lordship held that the fact that there was no written certificate of the engineer proved or in existence, the procuring of which certificate was a condition precedent to the right to recover on the contract, and that there was no evidence offered of the fraud and collusion between the engineer and the defendants pleaded by the plaintiffs in their reply, disposed of the contract counts.

As to the count in fraud, his Lordship held that a verdict should be directed for the defendants upon the third ground put forward by their counsel, namely, that the plans and specification must be taken together, and that there were no representations on the part of the defendants which were intended to be acted on; and he held that while the plans contained a statement as to the existence of the wall below Ordnance datum, which statement was an incorrect statement, the result of which was that the plaintiffs tendered at a lower figure than that at which they would have tendered had they known the truth, the effect of the 43rd, 46th, 47th, and 48th clauses of the specification was that taking the plans as controlled by the specification, they did not contain a representation, intended to be acted upon, that this wall penetrated 9 feet below Ordnance datum. As regards the two other alleged representations relied on by the plaintiffs, His Lordship held that there was no representation that the wall was watertight, and that with regard to the alleged representation made in clause 48, as to the information possessed by the Corporation, the liability of the Corporation as to the plans was controlled by the 43rd clause, and no additional liability was thrown upon them by the 48th.

His Lordship held that the Public Authorities' Protection Act, 1893, had no application to the case, that the duty which was the

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subject-matter of this action was not a public duty in the sense of that Act, and the only connexion between the cause of action sued for and any duty due by the Corporation of Dublin was that but for their being a Public Authority they would not have had power to enter into such contract at all.

As regards the fourth ground put forward by defendants' counsel, as regards evidence of consequential damage, His Lordship expressed his opinion that on this question, apart from the others, there would have been matter for the consideration of a jury.

The plaintiffs moved before the King's Bench Division for a new trial, on the ground of misdirection.

The Right Hon. J. H. Campbell, K.C., and *John Gordon, K.C.* (with them *T. M. Healy, K.C.*, and *E. A. Collins*), for the plaintiffs, confined their arguments to the causes of action for deceit.

Serjeant Dodd and *Ignatius J. O'Brien, K.C.* (with them *Charles A. O'Connor, K.C.*, and *P. O'C. White*), for the defendants, argued that the defendants were entitled to a direction on all the grounds put forward at the trial.

Feb. 27.

WRIGHT, J. :—

This action, as originally framed, comprised three claims; but by payment after action brought of the amount claimed under one cause of action, and by verdict directed for the defendants as to the other, two of the three claims of the plaintiffs have disappeared, and there only remains the third, which has been the subject of the argument before this Court, and that is a claim for damages for fraud. The fraud is alleged to consist in false representations made by the defendants to the plaintiffs as to the existence and depth of a certain wall, and its capacity to keep out water, and also in representing that they, the defendants, had in their possession information as to the structure, nature, and position of the wall and its foundations, whereby plaintiffs were induced to enter into a losing contract, and sustained damage to an extent of upwards of £20,000.

The general facts of the case so far as material may be very shortly stated. In the year 1899 the defendants being anxious to get certain large and extensive works executed at the Pigeon-house Basin, Ringsend, in connexion with the Dublin Main Drainage scheme, got plans and drawings and specifications prepared by their engineers, and invited tenders. Among others who tendered were the plaintiffs, a well-known firm of contractors of the highest position and eminence. Copies of the plans and specifications were obtained by them towards the end of June, 1899, and their tender was sent in on 14th July, 1899, which, after some delay and discussion, was accepted, and a formal contract for the execution of the works was signed, and bears date the 7th of October, 1899; by it the specifications, conditions of contract, bills of quantities, and schedule of prices were incorporated with and made part of the contract, and the plans, drawings, and sections, numbered 1 to 25, were signed by Mr. Cass for the plaintiffs, and by Mr. Spencer Harty, the defendants' engineer. Almost immediately afterwards the work was commenced.

One of the essential matters shown on the plans is what is known as the north harbour wall, and it is alleged that not merely in one drawing, but in several, this wall is clearly shown as going down to a depth of 9 feet below Ordnance datum. The contractors built a coffer dam across the entrance to the old harbour so as to exclude the water, and, according to the case put forward on their behalf, thought that the space inside had been made practically water-tight. In this they were mistaken, as the water came in in large quantities, and in or about June, 1900, they ascertained as a fact that this north harbour wall did not go down 9 feet below Ordnance datum, or any depth, and, in fact, rested on the mud.

This north harbour wall has been called in the evidence "the back-bone of the scheme." According to Sir Weetman Pearson's evidence (Answer 23), "where you had an existing wall that went 9 feet into the ground, and a wall that had 24 feet width, you had the very finest coffer dam that it was possible to conceive for the exclusion of the water." According to the same witness, on the assumption that the plans truly showed this wall as going down

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to a depth of 9 feet, the cost of pumping would have been a comparatively small item, and the estimate under this head was stated to be £748; whereas, if the truth had been known in the beginning, if it had been stated across the face of the plans that it was unknown whether this wall existed, the only alternative to carry out the work would have been to enclose the whole of the area on the Liffey side with a coffer dam, which he estimated would have cost £25,000 (Answers 107, 108). When the awkward discovery was made, as it was in June, 1900, that this wall had no such depth, it became necessary, if the contract was to be carried out, as the parties wished that it should be, to substitute some other mode of excluding the water, and, accordingly, after conference with defendants' engineers, a new arrangement was arrived at for the purpose of carrying out the contract. The mode adopted was to shift the position of the works 47 feet, and make an embankment 40 feet wide immediately behind the existing harbour wall; in the course of executing this substituted work an enormous amount of pumping became necessary, at a cost, according to the evidence given for plaintiffs, of £20,648. This work occupied the latter part of 1900, and the whole of 1901, and during this time all that plaintiffs knew, according to their evidence, was that, in fact, the north harbour wall did not go down to any depth below Ordnance datum, but they believed the statement put forward in the defendants' specification, that the drawings in which the wall was shown to have such a depth were prepared from the best information in the possession of the Corporation. Early in 1902 (February, 1902) plaintiffs say they learnt the whole truth, namely, that defendants had no information as to the existence or depth below Ordnance datum of this wall, and after several letters had passed between the parties, and the contract work had been completed, and a necessarily long lapse of time, the present action was commenced. The action is, as it now stands, the other causes of action having, as I have stated, been disposed of, an action for damages for fraud. At the close of the plaintiffs' evidence the learned Chief Baron directed a verdict for the defendants, holding that there was no question for the jury, and we have to decide was he right in so directing. It, therefore, becomes necessary to examine the evidence given at the trial, so as to ascertain was there

evidence proper to be submitted to a jury in support of the plaintiffs' case, and in examining the evidence I have no intention of expressing, and I am not to be taken as expressing, any opinion upon the strength or weakness of it as bearing upon any of the issues essential to the plaintiffs' case. I have only to consider was there evidence upon each one of them. The materials upon which the plaintiffs based their tender were the plans, drawings, specifications, and conditions of contract. Sir Weetman Pearson's evidence as to the drawings is as follows (Answers 33–35) :—"Drawing No. 9 indicates to me, as clearly as anything could indicate, that there is an existing wall, which is shown in full lines wherever it can be seen at low tide, dead low water, and wherever the wall cannot be seen, it is shown in dotted lines. It shows that this wall exists to 9 feet below dead low water—9 feet below Ordnance datum." Later on (Answers 41,42) he says:—"In going through these plans line by line and figure by figure from beginning to end, there is nothing that would lead anyone to believe for one moment that there would be the slightest doubt as to the existence of the wall, and for the depth of 9 feet." And he also states that the general practice is to use full lines in depicting what is above ground and visible, and dotted lines to denote what is below ground and invisible, but that the use of dotted lines does not suggest any doubt or indefiniteness as to what is below ground. Mr. Cass, who superintended the execution of the works for plaintiffs, gives evidence to the same effect, *i.e.* that in every case the drawings show the level of the existing north harbour wall as being, at least, 9 feet below Ordnance datum (Nos. 272–280), and he also swears that the firm lines used in the drawings mean something which you can see, the dotted lines something which you cannot see, but which exists. Sir Douglas Fox, a witness of the highest eminence, stated that he had examined a complete set of the contract drawings, and his evidence is that they would, to his mind, clearly show to any engineer that a wall existed along the north side bounding the River Liffey, and that this wall was shown on the drawings distinctly as going down to a depth of 8 or 9 feet below Ordnance datum, and in some extent a little below (803–805), and that he would infer from the drawings that the wall was to

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serve as a coffer dam, and that a practical engineer would, in his opinion, say that it was an impossible work, unless that wall was practically impervious; and as to the use of straight lines and dotted lines, he says that while there is no universal custom among engineers as to the distinction in the use of them, they are generally used to distinguish between work above and work below ground, and he refutes the theory that the dotted lines are intended to show uncertain work which, according to him, is shown not by a dotted line, but by a break off (833).

Mr. Kaye Parry, C.E., also proves that the plans indicate that the north harbour wall goes down to a point at least 9 feet below Ordnance datum; and the evidence of Mr. W. T. Douglas, C.E., is to the like effect. Having regard to this large body of evidence, which stands uncontradicted, and to what the drawings themselves show, it cannot be seriously suggested that the plaintiffs have not made a case of a representation made to them of an existing wall going down to this depth of 9 feet or thereabouts, that is to say, a representation made of an existing wall which would have formed, according to Sir Weetman Pearson, the very finest coffer dam that it was possible to conceive for the exclusion of the water, and which, by putting on it for the depth of 9 feet the concrete lining contracted for, would have been rendered absolutely watertight, and a representation made in the documents furnished to plaintiffs, as to other persons likely to tender, on a matter, and a most material matter, for them to take into account in making out their tender, and here I wish to quote, and with all respect to adopt, the language of the Lord Chief Baron, that these plans "did represent that there was an existing wall there to the extent of substantially 9 feet below the Ordnance datum, and that the plans of these works were founded on the existence of that wall and of its being, or its being capable of being made, a water-tight wall." As I have already stated, it was discovered as early as June, 1900, that this wall did not go down to a depth of 9 feet or anything like it, and that, in fact, it rested on the mud, and, following upon the discovery, a new arrangement was come to for the purpose of overcoming the physical difficulties, and carrying out the contract work; it may have been that when the discovery was made that this wall had no depth below Ordnance datum

plaintiffs might have come to the conclusion that the work as designed was impossible of construction, seeing that this essential part of the scheme did not exist, and might have refused to be bound by a contract which events showed to be impossible; but however that may be—and the question seems to me to be by no means free from difficulty—plaintiffs did not, nor did the defendants, take this view: both parties considered that the contract was a subsisting contract which could be enforced and must be carried out, and could be carried out if modified and varied as it was in the manner I have already described; and here I may refer to the very large powers of altering and varying the works, or substituting other works, given to defendants' engineer by clause 8 of the specification, with power to regulate prices and expenses consequent upon such modification or departure from the original design.

Turning now to other matters as to which it lay upon plaintiffs to make out a *prima facie* case, I take up the evidence given by Mr. Hellins, in addition to that given by the other witnesses for plaintiffs.

The engineer of the Corporation was Mr. Spencer Harty; he is "the engineer" within the meaning of the specification and conditions of the contract. In the preparation of the plans, drawings, &c., he was assisted by Mr. Hellins, if, indeed, this work was not entirely left to him. Mr. George Chatterton, C.E., resident in London, and a gentleman of admittedly the very highest professional eminence, was consulting engineer to the defendants. Several letters written by Mr. Hellins to Mr. Harty were given in evidence, and were much relied on by plaintiffs, particularly three, dated respectively 7th June, 1900; 5th June, 1902; and 10th November, 1902.

Mr. Hellins was examined for the plaintiffs largely as to the truth of the statements contained in these letters, and, outside the contents of the letters, upon the whole case generally. From his evidence the following would appear:—The plans and drawings were prepared by him and his assistants on behalf of the Corporation, and were prepared according to him with the approval of Mr. Harty and Mr. Chatterton. When preparing them he knew that the question whether this was an existing wall in fact or not would largely influence the price in the tenders; that if a contractor

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had reason to believe that this wall was non-existing, his tender would be substantially increased; in fact, in that event the contractor practically should have estimated for a coffer dam, at a cost of about £25,000 (Answer 1475-79). He states, in the most unequivocal manner, that he intended to indicate by the drawings this wall as an existing wall, running down to a depth of 9 feet below Ordnance datum (Answer 1630): and while in one part of his evidence (Answer 1698) he gives reasons for his drawing the inference that the wall had a depth, if not of 9 feet, yet a considerable depth below Ordnance datum, in another place (Answer 1493) he says that he had every doubt as to the existence of the wall; every doubt as to the exact depth, the exact shape, the exact character, and the exact construction of it. He asserts the truth of the different statements contained in the three letters to Harty, already referred to; and here I wish shortly to refer to the contents of these letters. In the letter of the 7th June, 1900, written about the time when the discovery had been made that this wall practically rested on the river mud, he writes to say that the concrete facing to it, contemplated by the specification and drawings, cannot be effected; and that the tanks and other works must be bodily lifted some 47 feet; and the concluding paragraph of the letter is as follows:—"If the contract drawings assumed a wall which was watertight, then the facing the same with concrete was an anomaly, and, moreover, there is nothing on the drawings to indicate the watertightness or even existence of such a wall, for they could not be guaranteed, and the specification distinctly stated so. It is perfectly plain that if we did not know of their existence below the surface of the ground we could not guarantee any watertightness; and it is perfectly plain that, watertight or not, the intended contract was to be carried out."

In the next letter to Harty, dated 5th June, 1902, he says: "I am unable to agree that the contract drawings do not express a doubt of the existence of the foundation of the wall below the surface of the mud. In my opinion, the dotted lines on the drawings, and clauses 46, 48 especially, and 49, go to show that there was every doubt about them."

I have already called attention to the evidence of the several other witnesses examined on behalf of plaintiffs as to what these

dotted lines would convey to an engineer or contractor, and I shall deal later on with the three clauses referred to of the general conditions of the specification. In the letter to Harty, of the 10th November, 1902, he writes as follows :—[His Lordship read portion of the letter]. It would also appear from his evidence that no borings were made to ascertain the depth below Ordnance datum of this wall, and questions and answers 1723 to 1726 are very important. 1723. "Do I understand you seriously to admit that at the meeting of the three engineers (*i.e.*, Harty, as chief engineer; Chatterton, consulting engineer; and Hellins, assistant engineer) it was deliberately arranged that these plans were to be put forward to indicate what you have told us, on the information you have mentioned?" "Certainly." 1724. "Am I right in saying your statement on the 10th November is correct, that they were mainly influenced in this by the desire to have a cheap job?" "Certainly." 1725. "Was the object of this to induce the contractor to moderate his estimate?" "Certainly." 1726. "That is what it was intended for? The design was intended for that, and deliberately designed in that way?" "Certainly." "Deliberately designed by agreement and arrangement?" "Certainly."

It will be observed that not only in his letters but in his evidence he takes up the position that everything he did was done with the approval of, and in consultation with, Mr. Harty and Mr. Chatterton.

I am of opinion that there was evidence proper to be submitted to a jury of a representation false in fact on a material and even vital part of the contract made by the defendants' engineers, and made by them without any information as to the depth of this wall, whether from actual knowledge or from anything they had heard or learned, and that there was sufficient evidence to suggest to a jury that this representation was either wilfully false, or, if not wilfully false, was made recklessly and without any *bona fide* or real belief in its truth: *Derry* v. *Peek* (1); and there is also, in my opinion, evidence that the plaintiffs in making their tender, and entering into the contract, took into account and acted

(1) 14 A. C. 337.

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on this representation. Indeed, as to this latter element I may say *res ipsa loquitur*. It is so obvious that evidence is scarcely needed, but the evidence of Sir Weetman Pearson and Mr. Cass, already quoted, is to the effect that if the wall had gone down 9 feet it would have served practically the purpose of a coffer dam, and in making their tender they acted on the assumption that in consequence of the wall going down to such a depth pumping would not be a serious or heavy contingency.

I am further of opinion that there was evidence of damage sustained by the plaintiffs proper to be submitted to the jury. It is said that the damage claimed and proved was the cost of pumping, amounting to £20,648, and that this pumping was done under the substituted arrangement come to in June, 1900. But it is right to remember that this substituted arrangement was come to for the purpose of carrying out the original contract, the abandonment of which neither party ever contemplated; as plaintiff says, he had to take the risk and "face the music," meaning that he was bound to the contract and could not escape from it no matter how onerous it proved to be; and, again, bearing in mind that I am not trying the case, but seeing whether on the evidence there was a case to be tried, it appears to me that it was for the jury to say was the loss so sustained a loss resulting from, and a consequence of, the false representation; that whether the pumping, either wholly or in part, was caused by the representation, it seems to me impossible to say that there was no evidence of damage sufficient to sustain an action of fraud suffered by the plaintiffs, who, on their own showing, were by this representation induced to enter into this contract at a loss of several thousands of pounds; and I may point out that the defendants do not rely on this new arrangement by way of accord and satisfaction.

So far, I believe I am in practical accord with the learned Chief Baron; but I now come to the questions which appear to me to present much more difficulty.

The plaintiffs had before them not merely the plans and drawings but also the specification containing the general conditions, and it is said, and the learned Chief Baron has so ruled, as a matter of law, that the plans are controlled by the specification, and being so controlled, that they do not contain a represen-

tation intended to be acted on by the plaintiffs—that this wall went down to the depth shown: that is to say, that the representation as a whole must be considered. Plaintiffs cannot say—We acted on one part, the drawings, and ignored the other part, the specifications. The clauses of the specification relied on, and bearing upon this question, are Nos. 43, 46, and 48. [His Lordship read them.] As a matter of construction, it appears to me that these clauses are meant to safeguard the Corporation against liability for any inaccuracy in measurements, &c., as to which the contractor is to satisfy himself, and is to obtain his own information on all matters which can in any way influence his tender, and the general impression which they convey is that while they are careful not to vouch for, or guarantee, the accuracy of any figures or facts, the drawings are put forward as being honest, and, in certain particulars, specified in Nos. 47 and 48, as based on the best information in the possession of the Corporation. Clause No. 43 is, I believe, a usual clause in specifications, and as in contracts such as this, error may, of course, creep into the most carefully prepared drawings, specifications, and estimates of quantities, notwithstanding every honest effort made by skilled engineers to ascertain and set forth the exact truth; it is properly provided that in such case the Corporation shall not be liable, and the contractor is told to protect himself.

But does this clause extend to fraud perpetrated, or attempted to be perpetrated? Drawings such as these are not, and do not purport to be, mere guess work: they purport to give with perfect exactness all information as to figures and dimensions showing the existing state of things as ascertained by investigation made on the spot by skilled engineers and their assistants; and, in the present case, so far as they do not purport to state actual ascertained measurements in certain specified matters, they purport to set forth the result of the best information procurable by the defendants.

To call these drawings a rough picture, conveying or purporting to convey nothing accurate or exact, seems to me to wholly misdescribe their character and object. Subject to the check imposed by clause 43, they purport to tell an intending contractor everything sufficient to enable him to prepare a tender, and I can well understand that in practice and business a contractor resident in

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England, or anywhere else away from the place where the work was to be done, and seeing the notice inviting tenders from the defendants, the local body, and getting these drawings, specifications, and other documents, would say and believe that the measurements and dimensions, and statements as to physical facts, put before him by the local body were either the result of actual examination made on the spot, or if not that, of information not verified but honestly believed.

Assuming that there was evidence of a misrepresentation made by or on behalf of the defendants through their engineers in one of the documents, *i.e.* the set of drawings, which, if unqualified, would furnish evidence to sustain an action of damages for fraud, is the misrepresentation so made corrected by the cautionary statement contained in clause 43 and the other clauses? And in putting this case I put it on the basis that the Corporation is liable for the acts of their engineers—a matter which I shall afterwards discuss. If a man in a business communication with another, made for the purpose of leading up to and inducing a contract, says, "Such and such facts I have ascertained to be true, and others are true according to the best information I have in my possession," and if at the time he makes that statement he has verified the truth of none of the facts, and has no information, and if his statement is one which he thinks the person to whom it is made, whether from the exigency of the shortness of time, or the ordinary, albeit careless, practice of business men, will accept and act on without inquiry or verification, is he protected by this clause No. 43? I do not think, as a matter of law, he is. I agree that the whole representation must be considered, and the probable or natural effect of the whole and every part of it, and that one part alone of the statement cannot be looked at and the other part ignored. But it should be for the jury to say was the contracting party, the plaintiff, by the precise and accurate statement as to the depth of the wall, put off his guard; and did the defendants, in putting these facts and figures before him by their engineers, intend him to act on the information so given as true in fact, or believed to be true, notwithstanding the cautionary statement contained in this clause.

In this I differ from the Chief Baron, and I think the case was

one for the jury to decide. I again wish to point out that I offer no opinion as to the weight or strength of the evidence, on any one of the several questions involved.

Lastly, upon this branch of the case, assuming that there was evidence of a false representation made by the defendants' engineers sufficient in all essentials to justify a Judge in leaving the case to the jury, was that a false representation made by or on behalf of the defendants?

There is, as already pointed out in the evidence of Mr. Hellins, called as a witness for the plaintiffs, evidence that anything he did in the way of preparing the plans and drawings was done with the approval and concurrence of Mr. Spencer Harty, chief engineer, and Mr. Chatterton, consulting engineer to the Corporation, and with the object of effecting a saving to the Corporation by getting lower tenders. And, further, there is evidence that this object was attained. On the ordinary common principle that a Corporation can only do work of this kind through their agents and servants, I think the general principle laid down by the English Exchequer Chamber in *Barwick* v. *The English Joint Stock Bank* (1) applies, and that is, that while the master has not authorized the particular act, he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in.

It has been suggested rather than argued that the representation here was a representation made not by the Corporation, but to them, or, at all events, that their engineers were not in a position to make any representation which would bind their employers. I do not think that there is any real force in this view.

This is not a case of a representation put forward by an official outside the scope of his employment, as in *Newlands* v. *The National Employers Accident Association* (2), nor does it come within the principle of *Thorn* v. *London Corporation* (3), which was an action on an implied warranty, nor within the language used by Lord Cairns at p. 129 of his judgment. The whole matter was entirely within the scope of the employment of the engineering staff of the

(1) L. R. 2 Ex. 259, at p. 266. (2) 54 L. J., Q. B. 428. (3) 1 A. C. 120.

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Corporation; it was their proper business, and properly came from them, and, indeed, could not properly come from any other source.

Here the Corporation, while, of course, absolutely innocent of fraud, if fraud there were, or fraudulent intent, acted through its servants, and as the servants acted for the employer, who would benefit by the fraud, it would be contrary to all principle that in such case the master should not be answerable for the act of the servant.

This disposes of all the questions raised in the case but one, *i.e.*, Does the time limitation contained in the Public Authorities Protection Act, 56 & 57 Vict. c. 61, sect. 1, apply so as to be a bar to the action? As to this, I have only very briefly to express my opinion that the Act does not, either in spirit or letter, apply to a case of this kind, which is an action of fraud inducing a contract. The defendants are, it is true, a public body; the work they were carrying out was a public work, but what is complained of here is not anything done in execution of this contract, or of any duty owing to the public, but of an alleged fraud committed on an individual anterior to the contract, and on this question I wish shortly to say that I adopt the conclusion of the Chief Baron, and the judgment of Mr. Justice Farwell in *Sharpington* v. *Fulham Guardians* (1).

In my opinion, the verdict directed for the defendants should be set aside, and a new trial directed.

BOYD, J.:—

With the judgment of Mr. Justice Wright I fully concur, and I shall only briefly state my reasons.

For the purpose of carrying out the main drainage of the city the defendants proposed to construct at the Pigeon-house certain precipitation tanks, and they determined to utilise the old harbour that had existed there, with the view of saving the enormous expense that would have been incurred for the construction of such tanks, had it been necessary to make new works for enclosing same. Had no harbour existed, it would have entailed the build-

(1) [1904] 2 Ch. 449.

ing of solid and water-tight new walls, to enclose a space sufficient for the construction of the necessary tanks, and to reclaim same from the open sea or river. This would have required the erection of coffer dams, which would have been a very expensive operation. To avoid this expense it was resolved to make use of the old harbour. It was assumed by the defendants, and taken for granted by them, that as the harbour had existed for years, the outer walls thereof were good and sufficient for the purpose of excluding the water, and enabling the tanks to be constructed without incurring the expense of building new walls or executing new works for the purpose; and, accordingly, the plans and specifications for the works were prepared on that assumption.

Now, I have to consider on what basis did they form such assumption, and whether they had taken any steps to justify them in coming to such a conclusion, or enabling them in good faith to make such representation. I have read over the evidence given at the hearing, and inspected the plans and specifications, and I cannot find one particle of evidence which justified them in making any representation on the matter. On the contract plans very clear specific and detailed representations are made as to the existence of the north harbour wall, and as to its depth below the Ordnance datum level, and also as to the character of the wall. It is clearly stated that the foundations of the walls go down below the datum level at least 9 feet. I say "at least," for at the bottom of the wall its further depth is not given; but the plans, in my opinion, indicate that to the depth of 9 feet the defendants were assured of its existence, but below that depth they had no information. The bottom course is omitted, but down to 9 feet, not only is the wall shown and stated to be existing, but the taper of the wall from the top to that depth is clearly shown. (See plans Nos. 9 and 10; see also clauses 129, 130, and 136 of the specifications.) Now, on what information, evidence, or examination were these representations made? Simply none. No information or evidence was sought for or obtained, and no boring or other examination was made to justify the defendants in making these representations. Further, it is provided by the plans, specifications, and contract, that the so alleged existing wall was to be concreted on its inner face, and along the face so con-

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creted there was to be constructed the north effluent channel (see clause 130 in the specifications).

On the faith and in the belief of the existence of the "existing north harbour wall," the plaintiffs sent in a tender for the execution of the works, as shown on the plans and specifications, which was accepted.

The plans for the works were prepared, and were approved of by Mr. Harty, the permanent and chief engineer of the defendants, by Mr. Chatterton, their consulting engineer, and by Mr. Hellins, their resident engineer, prior to the year 1899, and are dated January, 1899.

The tender by the plaintiffs was made on the 14th July, 1899, and the contract was signed on the 7th October, 1899.

It appears from the evidence of Mr. Hellins, who was examined by the plaintiffs at the trial, and from the letters produced in evidence, that at the time the plans and specifications were prepared the defendants had not a particle of evidence as to the nature or character of the north harbour wall, nor as to its foundations, nor had they sought for or obtained any information on the subject; and yet they stated, in clause 47 of the specifications, that "the *information* on the contract drawings . . . is given as the best in the possession of the Corporation, but the Corporation does not hold itself in any way responsible for *its accuracy*." This clause clearly imports that they had information, but that they would not be responsible for the accuracy of that which they had. Now, if the Corporation or their officers had no information on the subject, with what object were the plans and specifications so prepared? I will leave Mr. Hellins to answer the question. In the first portion of his evidence he endeavoured to make the case that the plans and specifications did not show the existence of the wall below low water; but he failed in his contention, and the learned Chief Baron has so found, and, in my humble opinion, rightly so. He admits, however, that the existence of this wall was the backbone of the scheme (Answer 1572), and that he intended on the plans to indicate that it undoubtedly ran down to a depth of 9 feet below Ordnance datum (Answers 1630, 1631, 1636, 1637, and 1638), and that this was the common design and common purpose of the plans (Answer 1640). Mr. Hellins further in his

evidence admits that he and the other engineers of the Corporation had no information as to the character of the wall, or as to its foundation; and, in answer to question 1723, he admitted that at the meeting of the three engineers it was deliberately arranged that the plans were to be put forward to indicate what he had stated in evidence, on the information he mentioned, and that they were mainly influenced in that by the desire to have a cheap job, and that their object was to induce the contractor to moderate his estimate, and that the design was intended for that, and deliberately designed in that way by agreement and arrangement (1724 to 1726). I must say that, in my opinion, the evidence given by this gentleman, coupled with his letter of 10th November, 1902, was most extraordinary, and was powerful evidence to be submitted to a jury as to the existence of fraud in the preparation of the plans and specification, and in obtaining the contract in the case.

I do not consider it necessary to refer further to the evidence in the case, as all the facts in dispute have been found in favour of the plaintiffs by the Chief Baron, and he bases his judgment on the existence of clause 43 in the specification, which is included in the contract. I cannot agree with the learned Judge on the effect of this clause, and am of opinion that, notwithstanding the clause, there was a case which should have been submitted to the jury, as to whether the defendants intended that the representations contained in the plans and specifications were, or were not, to be acted on, and were, in fact, acted on, by the plaintiffs. I think the effect of Mr. Hellins' evidence shows what was intended, and what was the object, and that, what he not inappropriately called "the design," was to induce the contractor to moderate his estimate, and to enable the defendants to get a "cheap job." Clause 43 only provides against *charges* for extras or otherwise, in consequence of any *incorrect* information or inaccuracies, but does not, in my opinion, protect the defendants from the consequence of deliberate or reckless misrepresentations. Such misrepresentations, amounting, as they do, to fraud, would be sufficient to vitiate the contract.

In the case of *Tullis* v. *Jacson* (1), which was an action on

(1) [1892] 3 Ch. D. 441.

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a building contract, in which it was stipulated that disputes and differences arising out of the contract should be subject to the certificate of the architect, which should be final and binding, the plaintiff alleged that the architect was guilty of fraud in certifying for a smaller sum than was really due. It was held by Chitty, J., that the plaintiff had no redress in consequence of the terms of the contract, but he states the law as follows:—"If a contract was obtained by fraud, and in the contract itself there was the term inserted that neither party should impeach the contract on the ground of fraud, it may well be that such a term could not stand, and the reason is obvious, that the Court would set aside that contract, because it was obtained by fraud, and setting aside the contract it would set aside the stipulation." That is a case I put, by way of illustration, of fraud between the parties to the contract in its inception. If there was fraud in the inception of this contract, I think the defendants cannot rely on the provisions of either clause 43 or 48. I am of opinion that there was evidence of fraud in the inception of the contract in the present case, and that both the oral testimony and the letters put in evidence, especially the letter of Mr. Hellins to Mr. Harty, dated 10th November, 1902, clearly point to it, and show that the plans were prepared with the express intention that the representations therein should be acted on, and that they were designed with the object of effecting "a great saving in cost." Mr. Hellins, in his evidence in answer to questions 1723 to 1726, states that the three engineers deliberately arranged that the plans were to be put forward to indicate what he had stated, and that they were mainly influenced in that by the desire to have a cheap job, and that their object was to induce the contractor to moderate his estimate, and that this was deliberately done by agreement and arrangement of the engineers. Clause 48 in terms refers to "*the information*" on the contract drawings as being "the best in the possession of the Corporation," thereby intimating to the contractors that they had information on the subject, when in fact they had none.

In the case of *Derry* v. *Peek* (1) the law bearing on the question of fraudulent representations which will expose a party to an

(1) 14 App. Cas. 337.

action for deceit is most fully considered; and Lord Herschell, in his most exhaustive judgment, reviews all the previous cases on the subject, and (at p. 374) he states his three conclusions on the law, each of which, I think, applies to the facts in this case. The case of *Thorn* v. *The Lord Mayor and Corporation of London* (1), to which we have been referred, has no application to this case. That was an action for alleged breach of warranty, and not for deceit.

In *Arnison* v. *Smith* (2) Lord Halsbury adopts the language of Lord Selborne in *Smith* v. *Chadwick* (3), in which he says:—"I conceive that, in an action of deceit like the present, it is the duty of the plaintiff to establish two things—first, actual fraud, which is to be judged by the nature and character of the representations made, considered with reference to the object for which they were made, the knowledge or means of knowledge of the person making them, and the intention which the law justly imputes to every man to produce those consequences which are the natural result of his acts; and, secondly, he must establish that this fraud was an inducing cause to the contract: for which purpose it must be material, and it must have produced in his mind an erroneous belief, influencing his conduct."

Having regard to the principles to which I have referred, and to the facts in evidence in this case, to which I have alluded, I am of opinion that the learned Chief Baron was wrong in withdrawing the case from the jury, and in directing a verdict for the defendants; and I am further of opinion that the verdict so directed should be set aside, and a new trial granted.

GIBSON, J.:—

The Chief Baron's judgment is founded altogether on the clauses of the specification, particularly clause 43, which he held excluded the possibility of the plans containing any representation intended to be acted on. Having decided that there could be no such representation, he ruled that as a necessary consequence no question of fraud could arise. But for these clauses, he was of opinion that upon the plans, taken by themselves, a case was

(1) 1 A. C. 120. (2) 41 Ch. D. 348, at p. 367. (3) 9 A. C. 187, 190.

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made out which could not be withdrawn from the jury; he was prepared provisionally to find in favour of the plaintiffs all the matters necessary to support an action of deceit based on such plans; and he overruled the defences relying on the provisions of 56 & 57 Vict. c. 61, and on defendants' not being responsible for deceit of their engineer. The defendants contest his conclusions where adverse to them, and contend that they are entitled to retain the judgment pronounced in their favour on all three grounds: (1) that they were within the protection of the statute; (2) that if there was fraud, it was not fraud for which they could be held answerable; (3) that there was no evidence of actionable fraud when the specification and plans were read together. In the view that I take it is necessary to consider the entire case, but I shall not analyse the evidence in detail. In referring to the evidence where I am obliged to do so, I shall carefully abstain from expressing any opinion of my own as to the credit of witnesses or as to the conclusions which a jury ought to draw. My duty, so far as relates to matters of fact, is confined to the consideration of one single point—Was there a case made out proper for a jury to decide? In nothing that I say am I to be understood to reflect on the plaintiffs, who doubtless suppose they have a substantial grievance to complain of, or on the defendants, who, innocent themselves of conscious wrong-doing, repel a grave charge against their engineer, whose conduct is alleged to fix them with liability. When this unfortunate mistake in the plans came to light, the defendants at once met the plaintiffs in a fair and honourable spirit.

The plans and specification were prepared by the defendants' engineer, and it was unquestionably his duty to his employers to see that the plans were accurate, and the scheme feasible: *Moneypenny* v. *Hartland* (1); *Same* v. *Same* (2). For breach of such duty his employers would have a clear right of action: *Rogers* v. *James* (3); though contractors to whom he owed no duty of care would not: *Le Lievre* v. *Gould* (4). It was an essential part of the design that the north harbour wall, 25 feet wide, should be utilized as one of the sides of the new construction, so that, when

(1) 2 C. & P. 378.
(2) 1 C. & P. 352.
(3) 2 Hudson, 113.
(4) [1893] 1 Q. B. 491.

the harbour mouth was sealed by a new wall across the opening, there would be a water-tight continuous structure with new concrete lining that would save the expense of building a new wall all along, and would also make it unnecessary for the contractor to lay a coffer dam throughout, which, but for the existence of the wall as delineated, would have been required. The scheme was ingenious and economical, and of course reduced the amount of tenders. It was the scheme so designed that was contemplated by the Corporation, but the execution of it in detail might need modification, and the engineer was accordingly given the usual necessary powers. The plans purport on their face to be accurate and complete, and, as between the Corporation and their engineer, the latter represented to the former that the plans were correct and practicable. It is, however, argued that as between the contractors and the Corporation the plans adopted by the latter as the proposed basis of contract, by reason of the specification clauses, could not be treated as a representation to be acted on, and that the contractors were bound to regard the plans as a mere rough speculative sketch, every feature in which was to be verified by the contractors at their own risk, and could not even be treated as honestly represented. The plaintiffs acted on the assumption (perhaps imprudent, certainly natural) that the duty owed by the engineer to his masters (for Mr. Harty was city engineer) had been performed, and that what is described by all as the back-bone of the scheme had not been in its essence misrepresented. As only a short period elapsed between the first communication with the defendants and their tender, and the foundations of the north wall were hidden, the plaintiffs would be more ready to believe that the specific and detailed description which the plans professed to give was based on drawings in the possession of the Corporation or on accurate observation. The plaintiffs tendered and entered into the contract on this mistaken assumption. Afterwards, in May, 1900, when the harbour mouth was closed, instead of the water-tight basin that was expected, which could be pumped dry at small expense, it was discovered that the foundation of the north wall as depicted did not exist, and that the project which the contracting parties had contemplated was impossible in any business sense. In June, 1900, the engineer made an arrangement to shift the site of the

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tanks further back, interpose an impervious bank of 47 feet wide, and next it to build a concrete wall 9 feet at base. The plaintiffs regarded this modification as an economical and practical solution of the difficulty. The price was agreed on, and afterwards paid. The plaintiffs at the time considered that with this substituted work there would be no serious addition to their original estimate for pumping (Q. 784), but in this, later on, they found they were mistaken, the figure being raised from £748 to £20,684. The explanation of this given at the trial was that for certain reasons stated by the witnesses the substituted work was less effective in keeping out the influx of water than the old wall, if it had existed as described. A claim was made for this extra cost, and in February, 1902, Mr. Cass, plaintiffs' local representative, discovered, as he thought, that the plans had no sufficient information behind them, and that this would afford a loop-hole if an amicable settlement was not arrived at (Answer 786). In December, 1902, it was arranged that plaintiffs' claim should stand over till completion of the contract. This action has accordingly been brought. It relates substantially to extra cost of pumping alleged to have been occasioned by the non-existence of the north wall as described.

The cause of action founded on contract has been abandoned, being, as plaintiffs admit, untenable, having regard to *Thorn's Case* (1). That case has no relevance to the present controversy, as it related to implied warranty, not fraud, and all the surrounding facts were correctly stated (see p. 136). An action of deceit is paramount to contract; fraud cuts down everything. A contract induced by fraud, or even a record, cannnot be used as a legal answer to such fraud. *Non potest adduci exceptio ejusdem rei cujus petitur dissolutio.* This is obvious: *Stanley* v. *M'Gauran* (2); *May* v. *Platt* (3). Much of the argument before us was founded on confusion in this respect, it being fallaciously assumed that because clause 43 was conclusive against warranty—a contractual representation—it must equally exclude misrepresentation on the issue of fraud. Whether a contract might be so framed, as beforehand, to exclude complaint for particular kinds of fraud, we need

(1) 1 App. Cas. 120. (2) 11 L. R. Ir. at p. 335. (3) [1900] 1 Ch. at p. 623.

not now consider: *Tullis* v. *Jacson* (1). A condition to have that effect should be express and conclusive. Speaking generally, I think that every condition as to misdescription, however wide in its terms, whether it disallows or allows compensation for errors, must be read as subject to two qualifications. The first is that such condition protects only from the consequences of honest mistake, and does not shield fraud. The principle applies to sale of lands, sale of goods, company prospectuses, &c., and is of universal application: Sugden V. & P., c. 1, s. 43, p. 28; *Brownlie* v. *Campbell* (2); *Re Sandbach's Contract* (3); *Phelps* v. *White* (4). The second qualification which governs such conditions is that where the misdescription is fundamental, and goes to the root of the contract, the condition becomes inapplicable. Otherwise the parties might be forced by the condition into a contract they never contemplated. This is clearly so in sales of real estate. All contracts, including construction contracts, are governed by the same rule: *Re Puckett's Contract* (5); *Bush* v. *Whitehaven Harbour Trustees* (6); *Jackson* v. *Union Marine Insurance Co.* (7). This does not depend on fraud, but on the contract being found inapplicable, without default on either side, to circumstances which could not have been contemplated when the contract was made. When there is no default on the side of the other party, and no misdescription, the contractor must bear the loss arising from unexpected difficulties which he had overlooked: *Jackson* v. *Eastbourne Local Board* (8); *McDonald* v. *Workington Corporation* (9); *Bottoms* v. *York Corporation* (10).

The Lord Chief Baron, following this principle, apparently inclined to the opinion that the misdescription was so fundamental that clause 43 would not bind, and that the contractors might have declined to proceed. If clause 43 was insufficient to preserve the binding obligation of the contract as contract, can it be a conclusive answer to misrepresentation inducing the contract?

(1) [1892] 3 Ch. 441.
(2) 5 App. Cas. 925.
(3) [1899] 1 Ch. 99.
(4) 7 L. R. Ir. at p. 164.
(5) [1902] 2 Ch. 258.
(6) 2 Hudson, 121.
(7) L. R. 8 C. P. at p. 581.
(8) 2 Hudson, 231.
(9) *Ibid.* 222.
(10) *Ibid.* 147.

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Before I deal with the question of deceit, the main subject argued, I must first dispose of the two general defences, either of which, if established, constitutes a complete answer to the plaintiffs' application.

The first of these is the Public Authorities' Protection Act, 1893. I agree with the Chief Baron that, as a long series of authorities in analogous legislation demonstrates, the enactment does not apply to such special contracts as we have before us. Nor can it be extended to deceit inducing such contracts: such deceit could not, with propriety, be described as an act done in pursuance or intended execution of any statute or public duty. If the contract itself is not such act, neither is the fraud which causes it. A suit to set aside a contract for fraud plainly would be unaffected by the statute; where *restitutio in integrum* was impossible, and the only remedy was an action for deceit, must not the same principle apply? Whether, if there was no question of contract and false representation, a wilful moral wrong could be deemed an act done in execution of public duty, I need not now decide. Protection is only given where the act is done in honest belief that it is in course of duty: *Chamberlain* v. *King* (1). It is suggested that if the statute applies to libel and malicious prosecution, it must equally extend to an action for fraud. But implied malice in libel does not involve any evil intent, and though express malice is a necessary part of the proof in malicious prosecution, such malice and the absence of reasonable and probable cause do not necessarily exclude the existence of honest belief. Whether a public officer who, on the facts, was shown to have prosecuted without reasonable and probable cause, and maliciously, could claim the benefit of this type of legislation, is not covered by authority. In *Bostock's Case* (2) the defendants succeeded on the merits, and no question was raised or possibly could have been raised as to the nature of the action, as the controversy as to costs related not to pleading forms, but to the facts disclosed by the evidence. In *Kirby* v. *Simpson* (3) a Justice charged with acting maliciously, and without reasonable cause, was held entitled to notice of action. The decision was based on the special language

(1) L. R. 6 C. P. 474. (2) [1900] 2 Q. B. 616. (3) 10 Ex. 358.

and plan of 11 & 12 Vict. c. 44. Assuming, however, that an ordinary malicious prosecution might be within the statute, still if the prosecution was brought without any *bona fide* belief in the truth of the charge, it would seem difficult, consistently with the settled principle laid down in *Chamberlain* v. *King* (1), *O'Dea* v. *Hickman* (2), and similar cases, to hold that the statute protected such *mala fide* prosecution. In *Spitty* v. *Kitchin* (3), an action for false arrest and malicious prosecution, the jury found for defendant on the latter cause of action, but for the plaintiff on the former. The Court held that defendant was entitled to notice of action, as the jury found he acted *bona fide*. But whether libel or malicious prosecution can be deemed an act to which the statute applies or not, deceit necessarily excludes *bona fide* belief. It is conscious moral turpitude which is often secret and undetected for a considerable time. The statute extends to all persons discharging public duties, including servants and agents: *Doust* v. *Slater* (4); *Chambers* v. *Reid* (5); but not independent contractors: *Kent County Council* v. *Folkestone Corporation* (6). Would a sheriff (if the Act applies to him) be protected in an action for extortion (such as *Woodgate* v. *Knatchbull* (7)), or in an action for fraud causing loss to an execution creditor? If "act done" in the statute is to be understood in the sense explained in *Chamberlain* v. *King* (8), how is deceit, a *mala fide* act done without honest belief, to be deemed such an act? The statute was intended apparently to protect mistake or negligence, not wilful deliberate misconduct. The question of *bona fides* is for the jury: *Cox* v. *Reid* (9). I need not, however, discuss the general question further, as the particular species of fraud here charged was not such an act as the statute contemplates.

The second preliminary defence was that, assuming the plans to have been fraudulent on the part of the engineers, the fraud of the latter can impose no liability on the corporation. The learned

(1) L. R. 6 C. P. 474.
(2) 20 L. R. Ir. 431.
(3) 15 W. R. 903.
(4) 10 B. & S. 400.
(5) 13 L. T. (N. S.) 703.
(6) [1905] 1 K. B. 620.
(7) 2 T. R. 148.
(8) L. R. 6 C. P. 474.
(9) 13 Q. B. 558.

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Judge held otherwise. Before us the point has been rather indicated than argued. The plaintiffs' counsel treated it as too plain to require discussion, and no authorities were cited on either side. If the engineer, in preparing the plans, acted as agent or servant of the defendants, they would be liable, as the engineer would have been acting in the course of duty, and for their benefit, and they have procured the plaintiffs' execution of the contract on the faith of the plans proposed by them as the basis of contract: *Barwick* v. *English Joint Stock Bank* (1); *Hampson* v. *Houston* (2); *Hambro* v. *Burnand* (3). The case here is obviously different from one as to quantities prepared by an independent quantity surveyor, and from one where the action of an engineer, in his character of arbitrator or judge, in relation to certificates, &c., is challenged for fraud. In such case actual complicity on the part of his employers must be proved to make the latter liable. Whether an engineer or architect occupies the position of agent or servant depends on the particular facts of each case. In *Kimberley* v. *Dick* (4) the architect was held to be agent for his clients. In *Martin* v. *Arnotts, Limited* (5), the Chief Baron has kindly let me read his judgment, from which it appears that the defendants were sued for alleged fraud of their architect, who, after a tender had been accepted on certain specifications with appropriate quantities, substituted another specification to which different quantities were applicable, and the plaintiffs executed the contract referring to such last specification in ignorance of such substitution. The Court held that if the fraud was made out, the defendants would be liable. In the present case the engineer was servant of the Corporation, in whose regular employment he was; the plans were held out as the foundation of the contract; and clauses 47 and 48 of the specification refer to information in the possession of defendants, which probably means information, such as it was, acquired by the engineer as their servant, some of it years before, by operations described in the evidence. If the Corporation are not responsible for the engineer's fraud as to the plans, the plaintiffs would be practically without

(1) L. R. 2 Ex. 259.
(2) [1903] 1 K. B. 85.
(3) [1904] 2 K. B. 17.
(4) L. R. 13 Eq. 1.
(5) Unreported.

redress, as an action against the engineer might be illusory, if the same could be maintained at all. Possibly such action would be legally competent, though I am aware of no decision on the subject. Supposing that the engineer is not servant or agent of the Corporation, his duty to his employers, it might be argued, may be considered as performed when he sends in his plans, and it may be said that as to such plans he makes no representation to intending contractors: *Cavalier* v. *Pope* (1); *Peek* v. *Gurney* (2). If no personal action could be maintained against the engineer, guilty of fraud in relation to plans before contract, where such engineer was not servant or agent—this would be a strong argument for inferring agency. But, as I think there is at least evidence that the defendants were responsible as principals, I need not decide whether the engineer could be sued if he was not servant or agent. It was not argued before us, though it was apparently argued in the Court below, that the plans could only be considered as representations by the engineer to the Corporation, his employers, and could not be regarded as representations addressed by the defendants to persons proposing to tender. The contract itself answers this. I shall, therefore, deal with the case on the footing that the defendants were, or might be, auswerable if there was fraudulent misrepresentation in the plans which, prepared by their own engineer and adopted in the contract, were accredited, to some extent, at least, by the clauses in the specification to which I have already referred. The contract on its face expressly states that the Corporation have caused plans, &c., to be prepared by "their engineer," that is, their regular salaried employee (to whom special local knowledge would be attributed). It was not disputed that the engineer was identified with Mr. Hellins, and that evidence of actionable misrepresentation affecting the latter equally affected the former. The mental and moral condition of each was the same.

This brings me to the questions mainly argued: Was there evidence of fraudulent misrepresentation inducing the contract? and were the plaintiffs thereby damnified?

There was clear evidence that if there was a representation

(1) [1905] 2 K. B. 757. (2) L. R. 6 H. L. 377.

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arising on the plans, such representation was material, was untrue, was intended to be acted on (unless clause 43 excludes the possibility of such intention), and was, in fact, acted on by the plaintiffs. I do not deem it necessary to discuss this conclusion, which appears incontrovertible, and accords with the opinion of the Lord Chief Baron. I, therefore, at once proceed to examine the real matters in controversy so fully discussed at the Bar :—

(1) Was there evidence of any representation as to the wall going down 9 feet below Ordnance datum ?

(2) Was there evidence that such representation was intended to be acted on ?

(3) Were the plaintiffs at liberty to act on such representation ?

(4) Was there evidence that, if the plans amounted to a representation, such plans were prepared without honest belief in the representation they conveyed, and in reckless disregard of the truth or falsehood of such representation ?

(5) Was there evidence that the defendants had no real information as to the wall as described in the plans ?

(6) Was there evidence that the plaintiffs sustained loss by reason of the misrepresentation, if made ?

I agree with the Chief Baron that the plans and specification must be read together for the purpose of ascertaining the force and effect of any representation attributable to the plans. The first three questions turn entirely, according to the Chief Baron's view, on the 43rd clause of the specification, and must be considered together. Apart from that clause, he was of opinion that these questions should be answered affirmatively. I shall postpone the examination of these first questions, till I have answered the fourth and fifth, as if there was no evidence of lack of honest belief, the plaintiffs' case entirely fails, irrespective altogether of clause 43. I understand from his judgment that the Chief Baron thought that there was evidence to support a case on the plans, but held that clause 43 conclusively repelled any intent. It would have been obviously more satisfactory to the defendants to be acquitted on question 4, which raises a moral issue, rather than on the technical reasoning arising on clause 43. Apart from that clause, the Judge clearly would have let the trial proceed.

I, therefore, take up questions 4 and 5; if the plaintiffs are defeated on these, the direction cannot be questioned. If the plans convey a material misrepresentation, was there evidence that such misrepresentation was the result of reckless disregard whether the representation was true or false, and without any honest belief? The plaintiffs contend that, even if the engineer was not actually aware, as a matter of fact, that the foundation was non-existent, still he had no reasonable, or indeed any, ground for believing that the foundation as described did exist; they urge that the foundation depicted was reckless guess-work, introduced merely to suit the exigency imposed by the specification and plans in reference to the new work, the new wall being designed to go down 9 feet below datum. Mr. Harty's letter of May, 1900, suggests that he had even then no real information on the subject of the wall. Caution is necessary in applying the maxim *culpa lata æquiparatur dolo*; for negligence, however gross, is not fraud, any more than want of reasonable and probable cause is malice; but there may be such absence of reasonable ground for belief as to convince that there was no honest belief at all: *Derry* v. *Peek* (1). There are many cases to this effect at law: *Chamberlain* v. *King* (2); *Lynch* v. *Nurdin* (3); *Goodman* v. *Harvey* (4). It was a familiar principle in equity that wilful or gross negligence might warrant an inference of fraud, *e.g.*, *Whipps' Case* (5). Similarly, absence of reasonable and probable cause would support a conclusion of malice and the non-existence of honest belief: *Brown* v. *Hawkes* (6). Here the three matters on which, and on which only, the inference was alleged to have been drawn that the wall-foundation existed as described in the plans were, according to the plaintiffs' evidence, quite inadequate to justify the apparently exact description and measurements that the plans present. Mr. Hellins (with whom defendants admit that Mr. Harty was identified) felt this, and he alleges that accordingly, in addition to the clause in the specification (which he considered to be of a cautionary nature), he depicted the foundation of the wall within dotted (not full) lines, with the intention of showing that the

(1) 14 App. Cas. at pp. 369, 373, [374.
(2) L. R. 6 C. P. at p. 478.
(3) 1 Q. B. at p. 38.
(4) 4 A. & E. at p. 876.
(5) 26 Ch. D. 482.
(6) [1891] 2 Q. B. 718.

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existence and dimensions of the portion enclosed by such lines was doubtful. If the dotted lines were intended to indicate doubt, it is unlucky that the word "existing" was written on the very part the existence of which was to be shown as doubtful. In answers 1669 to 1672 the witness appears to recede from his former statement and to accept the view that the dots were intended to describe work out of sight—a change of attitude observed upon by the Chief Baron. In answer 1612 he states that the note on the plans stating that the walls were shown at their correct levels, was not intended to refer to the north wall. Plaintiffs reply that the note would convey quite a contrary meaning. When stating that the dots were used as a warning or danger-signal, the witness does not allege that there was any general convention or usage which would support such interpretation. There is cogent evidence that on these plans the dotted lines would, according to ordinary usage, denote work which was concealed from view. I entirely concur with Mr. Douglas (Answer 1235) that where there is uncertainty as to anything shown on a plan, this should be distinctly stated. It would have been easy, dealing with such a vital matter, to have appended a special note that nothing was actually known as to the foundation portion which was only conjectured to possibly exist. There is no use in giving an indication which (to use the expression in Mr. Hellins' letter of November 10, 1902) most men would misunderstand. With what intention were the dots used? How would they be reasonably understood? Were they used to denote hidden work? Had the engineer any real genuine belief as to the existence of the foundation as described? If the existence and dimensions were believed to be doubtful, why was not such doubt expressly and clearly stated? Did the non-disclosure of the doubt evidence want of good faith? The plaintiffs contend that all these questions ought to be answered by a jury adversely to the defendants. If intention is a matter of fact (*Edgington* v. *Fitzmaurice* (1)), so is belief. It is a good assignment of perjury that a witness stated on oath that he thought a certain writing was not his, whereas, in truth, he thought it was: *Reg.* v. *Schlesinger* (2).

(1) 29 Ch. D. 459. (2) 10 Q. B. 570.

But it may be said, why would the engineer consciously make a misrepresentation which would be detected when the contractors commenced operations? A jury might (I do not say they ought to) find that the engineer, in his anxiety to reduce estimates, took chance, and expected that once the contract was made, the contractors would be bound by the special conditions, and would be in his power, as the specification (see clauses 6, 8, and 39) made the engineer supreme and final judge. The terms of the letter of November 10, 1902, might be relied on as supporting this view. The Corporation were free from liability either in contract or for negligence in respect of the plans, and any loss occasioned by the engineers' default from the plans turning out to be inaccurate would fall on the contractors. If the existence and dimensions of the wall-foundation were known to be doubtful, this uncertainty (it is argued) should have been expressed in intelligible terms: this would be the more necessary as clauses 129 and 130 in the specification, the slightness of the floor of the tank, and the fact that the existence of the foundation, as described, was known to be essential to the execution of the design, would encourage a belief that the plans as to this vital matter were substantially correct, or at least not a mere irresponsible picture. What was in the mind of the engineer was for the jury, not for me. The law attributes to everyone an intention to produce the natural consequences of his acts: *Smith* v. *Chadwick* (1); *Coaks* v. *Boswell* (2); *Arnison* v. *Smith* (3). A jury might decline to allow a person making a false representation to escape liability by alleging that, according to an esoteric and peculiar interpretation of his own, the representation was intended to bear a meaning which was not its natural and obvious one. I think therefore that on question 4, there was evidence that the plans were prepared in a deceptive manner, without an honest genuine belief that the representation was true.

The same conclusion applies to answer 5 with even more force; as clause 48 conveys that the Corporation had information justifying the plans.

Assuming that there was evidence on the plans, taken by

(1) 9 App. Cas. at p. 190. (2) 11 App. Cas. at p. 236. (3) 41 Ch. D. at p. 372.

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themselves, on which a jury might find that there was material misrepresentation which might be fraudulent—a matter which stands detached from clause 43, or at least not necessarily dependent on it—I now go back to the first three questions, consideration of which I had postponed. Clause 43 applies to all, though the direction at the trial rests mainly, if not altogether, on the second. What is the effect of clause 43? According to the Chief Baron, its necessary consequence was that there could be no representation intended to be acted on, and there could therefore be no fraud, intention being an essential ingredient in deceit. His opinion, I would gather, was that though the plans on the evidence would support a case of dishonest misrepresentation, such cause of action was conclusively disposed of by clause 43. I doubt if the learned Judge contemplated the application of clause 43 to a case of wilful proved falsehood in the plans, but the logical result of his view, as plaintiffs' counsel argued, may be that the clause would apply to such case, and would make it impossible for the defendants to be fixed with intent to deceive in relation to a misrepresentation known to be false. The principle, if correct, applies to all kinds of contract; it cannot be restricted to construction contracts. Accordingly, a general formula would be supplied, by the use of which a dishonest person, concocting false particulars or plans, would get *carte blanche* in the field of fraudulent invention, and would be enabled to operate with impunity. The party complaining of deception would always be met with a conclusive answer: "I expressly warned you not to rely on my particulars, plans, &c.: you were told you must act on your own sole responsibility; and I stipulated that the contract must be on that basis." Mr. Campbell said that there was no authority for this proposition. None was cited, and I have found none. Clause 43, and similar clauses, must be construed as subject to the two qualifications already stated; they do not cover fraud or such a fundamental misdescription as would completely alter the subject-matter contemplated by the contract.

Was there evidence of a representation intended to be acted on by persons at liberty so to act? First, was there a representation that the wall went down to 9 feet below Ordnance datum? The learned Judge found that on the plans there was such representa-

tion, that the dotted lines only denoted unseen work, and that this foundation was the back-bone of the scheme. Does clause 43 take out this back-bone and make the scheme invertebrate? Unquestionably, the plans were intended to represent to the defendants, the engineer's masters, that the back-bone was there. The engineer owed an actionable duty of care to his principals, though not to the contractors. But when his principals put forward the plans, showing the back-bone, as the subject of tenders, can clause 43 preclude the contractors from saying that the Corporation made a representation to them as to a matter which was an essential part of the subject of contract—a representation therefore necessarily to some extent intended to be acted on? I agree that the plans and specification must be taken together. The specification excludes any warranty of accuracy of the plans. If there was a warranty, deceit would be irrelevant to that cause of action. The specification may also qualify the force of the representation, but it does not extinguish it. No point was made at the trial or before us that the pleading may put the representation too strongly. If it does, and such an objection had been made, an amendment would have been at once allowed. On the broad question argued, whether the specification converts these elaborate plans with measurements into a mere speculative sketch, showing possibilities, not facts, I entertain no doubt. The contract was made to carry out a particular scheme as designed and not something essentially different. The plans purported to be honest plans, though, if inaccurate, they might, as to details, require modification. They represented what was the subject-matter of contract; the specification clauses, which were in nature ancillary, cannot be read as destroying such subject-matter. They do not enable the engineer to substitute new plans radically different from those on which the tender was made.

If there was a representation, was it intended to be acted on? This question of intention is important when a representation, alleged to be fraudulent, is made to third parties: *Barry* v. *Croskey* (1). As between parties to a contract, every material misrepresentation made by one to the other, in fact inducing the

(1) 2 J. & H. 1.

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contract, justifies an inference of intention to produce that result: *Smith* v. *Chadwick* (1); *Coaks* v. *Boswell* (2). For the reasons already stated, clause 43 does not exclude the inference of such intention. If the plans and specification had contained a wilful falsehood, as, for example, that accurate measurements of the depth of the wall-foundation had been taken, though the accuracy of such measurements was not guaranteed, could it be said that clause 43 was conclusive that there could be no intention to deceive? Falsehoods are not told without an object. A plan falsely misrepresenting a matter vital to the performance of a contract, supplies in itself some evidence of intention to influence the contractor. Were not the plans here intended to be acted on as at least honest? Were the plaintiffs at liberty to act on the representation? Clause 43 might be more applicable here. Lord Chelmsford's remark in *Thorn's Case* (3) as to the unreasonableness of contractors placing their confidence in specifications without examination, is relied on. The remark has no application to a case of deceit founded on dishonest plans. There the surrounding circumstances were correctly stated, and the difficulties found in carrying out the work could have been discovered on careful examination of the specification and drawings by any competent civil engineer (4). Just as means of knowledge is not the same as knowledge for the purpose of fixing liability for deceit, so actual knowledge must be brought home to the plaintiff to constitute a defence on the ground that the contract was not induced by deceit: *Stanley* v. *M'Gauran* (5), *per* FitzGibbon, L.J. Means of knowledge, negligence, or credulity, on the part of the party misled, is no answer: *Aaron's Reefs* v. *Twiss* (6); *Arnison* v. *Smith* (7). It is a good defence to prove that the plaintiff was not in fact deceived, but it is no defence to show that he ought not to have been deceived if he had taken proper care. Hence usual conditions or clauses throwing on the contracting party the responsibility of accepting particulars or verifying particulars, cannot *per se* answer a case of fraud. Such clauses are addressed to error,

(1) 9 App. Cas. at p. 190.
(2) 11 App. Cas. at p. 236.
(3) 1 App. Cas. at p. 132.
(4) L. R. 9 Ex. at p. 169.
(5) 11 L. R. Ir. at p. 343.
(6) [1896] A. C. at pp. 279, 288.
(7) 41 Ch. D. 348.

not deceit. On this principle, a sale with all faults, whether of land (*Early* v. *Garrett* (1); Sugden, V. & P., p. 334), or of goods (*Schneider* v. *Heath* (2)), is vitiated by fraud. In *Barwick's Case* (3), though the guarantee was made expressly subject to the claim of the Bank—a statement which obviously in prudence demanded inquiry—the plaintiff was held entitled to recover on the ground of deceit. A material misrepresentation inducing a contract cannot be got rid of by a contemporaneous statement that such representation is not to be relied on. A most insidious and dangerous form of deceit is where the falsehood is masked by a delusive semblance of ostentatious candour, or professed anxiety that the person to be misled should make personal investigation. The position and rank of a party making a representation are often such as to inspire confidence and reliance on his honour and integrity. It behoves such person to be careful that his statements are at least honest. If there has been substantial misdescription, to make such misdescription innocuous, it must be admitted and corrected: *Arnison* v. *Smith* (4). Here the object of clause 43 was not to admit or correct misdescription, but to preclude complaint grounded on mistake, and any suggestion of implied warranty as to the accuracy of the plans. I must, therefore, decide that the ground of direction was erroneous. In so holding, I wish again to repeat that my opinion is confined to the question whether there was a case for the jury, and that I express no view as to what verdict a jury ought to pronounce, or as to the weight and value of the evidence. My reasoning is provisional and hypothetical, and though I have been necessarily obliged to use the words "fraud," "want of honest belief," &c., I do so conditionally and without intending to convey that such expressions represent either my own opinion or the conclusion the jury ought to arrive at.

The last point argued was that no damage directly attributable to the alleged fraud was proved, and that, damage being essential to the cause of action, the defendants must succeed. The substantial loss sued for is in respect of pumping, the original estimate for which has been raised from £748 to £20,684. Under clause 120

(1) 9 B. & C. 928.
(2) 3 Camp. 506.
(3) L. R. 2 Ex. 259.
(4) 41 Ch. D. 348.

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of the specification all pumping was to be done by the contractors. Pumping was not a separate figure, but was included in excavation. Before any excavation work was done, the mistake in the plans was discovered. Under the altered conditions, the plaintiffs would probably have been entitled to treat the contract as non-existent. The parties, however, seem to have regarded it as still binding, and before us counsel on both sides agreed that the contract remained in force: the defendants' counsel, because they contended that the plans were a mere rough picture, the essential part of the contract being the specification; the plaintiffs' counsel, because if the contract was at an end, loss in respect of the new work would be referable to a new contract, and not to any fraud connected with the old defunct contract. It is clear that if the pumping was under a new substantive contract, defendants would not be liable for extra cost of pumping thrown upon the plaintiffs by reason of their having estimated this item at too low a figure. It would seem that it would be a jury question as to the terms and contract under which the new work was executed. What happened was this. In lieu of the non-existing north wall foundation, a bank and wall were to be built, and this expedient, after discussion between plaintiffs and the engineer, was regarded by the plaintiffs as a cheap and practical substitute for the original foundation. They did not anticipate any substantial increase of pumping; their original estimate for excavation, including pumping, was allowed to remain unaltered, and the prices were settled amicably on that basis. Their expectation was falsified in event, and it is now alleged that had the north wall foundation existed as described, it would have been more effective in preventing leakage and influx of water than the new substituted work. Whether this is right or wrong I need not consider. There is evidence to that effect. With the new work, the floor of the tank had to be increased in thickness from 1 foot to 3 feet 3 inches, to resist the water-pressure. It is argued for the defendants that there was a substantive bargain as to such new work, and that the loss in respect of this unexpected pumping arises not from any initial misrepresentation, but from a miscalculation as to the risk, when, with full knowledge of the true state of facts, the new work was arranged and the prices fixed. The plaintiffs reply that

the work and prices were arranged for as an extra under the contract; that they were not free agents, believing that they were bound by the contract, which gave the engineer supreme authority. Their position (they say) cannot be affected because they concurred in the proposed expedient, and acquiesced in the prices, as, whether they agreed or disagreed, supposing as they did that the contract was in force, and being ignorant that it was voidable for fraud, they were under the control of the engineer, in whom all responsibility and authority resided, and who was master of the situation. There was, they urge, no new contract completely or partially rescinding the one then existing; there was only new extra work, constituting a modification, which the engineer was authorized to order. The learned Judge accepted this argument; and I think that on the most favourable view for the defendants there was, at least, a jury question. There could be no question of accord and satisfaction of a claim based on fraud which was not then known to the plaintiffs, and no such defence is pleaded; nor, indeed, could it have been pleaded without admitting that there had been fraud. The defendants only can rely on absence of evidence of direct damage resulting from the alleged fraud. Looking at the case as a whole, apart from this point as to the new work, I doubt if it would be one for direction. By the alleged fraud a disadvantageous contract was imposed on the plaintiffs, and the duration of performance was necessarily prolonged by the absence of the wall which it was necessary to replace by a work which, apart from the uncertainty as to its effect, would take a considerable time to construct. There would be some damage over and above pumping expense, though this item was the substantial basis of the claim in the action: *Pontifex* v. *Bignold* (1); *Cracknell* v. *Davy* (2).

If the case has to be tried out, I trust that the jury will be assisted by evidence as to the river bottom and the nature of the strata. It is quite possible that a large body of water would have made its way into the harbour basin from other directions, and also under, as well as through, the wall foundation, even if it had

(1) 3 M. & G. 63. (2) 1 F. & F. 57.

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existed in fact as described. As to water-tightness, the plaintiffs were not entitled to assume that the portion of the wall out of sight was superior in construction or effect to the upper portion, which was visible and inspected by them. Without such evidence as I have referred to, a jury might regard the plaintiffs' claim as resting on speculative inferences after the event, and might prefer the contemporaneous opinion formed by Sir W. Pearson, with full knowledge that the foundation did not, in fact, exist. Plaintiffs cannot, by alleging deceit, recover as damages a loss really attributable to their own mistaken estimate of the risks fairly arising under the contract.

In result, I agree generally with the conclusions of fact and law arrived at in the judgment under review, save on the single point as to the effect of the specification clauses, to which the learned Judge assigned a more conclusive operation than I think they possess. These clauses supply an important element of fact for a jury, when they come to estimate the force, weight, and intention of the representation conveyed by the plans; but they do not entitle the defendants to a direction in an action of deceit, though they would be decisive in an action of contract.

With the hesitation I always feel when differing from the opinion of such an eminent Judge—a hesitation greatly increased by my Lord's concurrence in that opinion—I find myself obliged to agree with my brothers Wright and Boyd, that there must be a new trial. The plaintiffs must have their costs of the argument and their costs of the trial, so far as related to the cause of action for fraud. These costs will be set off against the costs of the judgment in defendants' favour on the contract issues.

LORD O'BRIEN, L.C.J.:—

Were it not that I am of opinion that the defendants were entitled to a direction in their favour on a ground in addition to that on which my Lord Chief Baron's opinion rested, I think I would be justified in saying that I concur in his opinion, and have nothing to add to it. However, as I think the defendants were entitled to a direction on more grounds than one, I shall, as succinctly as I can, summarise my views.

Just a word before I apply myself to the facts. So egregious was the blunder in representing a wall, which did not exist at all below the surface, as in fact existing to the extent of 9 feet below it, that I feel it is very necessary that we should be careful not to suffer our minds to become so intolerant of other considerations as to confound that which is not with that which is the determining factor in the case. It is absolutely essential not to permit ourselves to be diverted from a critical examination as to the effect of the 43rd article of the specification, which is the main and distinguishing factor in the case.

Now, then, for the facts:—

At the close of this case there were a count in contract and a count in fraud to be dealt with. To the count in contract the defendants pleaded that it was a condition precedent to the plaintiffs' right to sue that the engineer of the Corporation should have given a certificate as to the work done. The plaintiffs in their reply admitted that this was so, but pleaded that the certificate was withheld owing to the fraud of the defendants and their engineer acting in collusion; that, in fact, the Corporation and their engineer had conspired to defraud the plaintiffs. No graver charge could possibly be brought against a public body, and yet at the trial there was no evidence whatsoever to sustain this charge. It was in fact abandoned. The charge persisted in was substantially this: that the plaintiffs were induced by the fraudulent representations of the defendants to tender as they had tendered. The main, though not the entire, allegation was, that the defendants had in certain drawings fraudulently misdescribed certain physical conditions with a view to inducing the plaintiffs to tender at a low figure, and that the plaintiffs were thereby defrauded into tendering and sustained damage. This was the way the case was put in argument.

I ventured to ask—When did it become known that the drawings and plans incorrectly represented the physical conditions? When did it become known that the representations on the drawings were so entirely wrong? When were the true physical conditions made manifest? When was the actual state of things laid bare?

The reply was—Some considerable time before the letter of July 9th, 1902, was written. This letter was written by the

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plaintiffs who are now charging the defendants with fraud. It runs thus:—

"*July 9th*, 1902.

"CONTRACT No. 4.

"DEAR SIR,—We are obliged for yours of the 4th instant, and note its contents.

"We observe that you say that, in your judgment, there is no foundation whatever for the allegation that there has been any misrepresentation of facts in connexion with this contract. We beg at once to assure you that we do not suggest for one moment that we have been intentionally misled in any way. Doubtless, so far as the Corporation is concerned, the misrepresentation of which we complain was a pure mistake. However, we relied upon it, and have suffered loss thereby. . . .

"(Signed) W. D. PEARSON."

This is the letter of the 9th July, 1902, and it will be seen that in this letter the charge of fraud now so vehemently pressed is emphatically disclaimed. When the actual state of things was discovered, the Corporation, so far from raising any difficulty, said in effect, "Do what you consider practicable in the situation, and we will pay you." It was then quite competent for the plaintiffs to say, "We will have no more to say to you: the basis upon which we contracted does not exist. We retire from the undertaking: pay us for what we have done." So far from saying or doing this, another plan was devised by plaintiffs and the defendants' engineer to carry out the scheme, not by the original method, but by a different plan, and by different works from those originally contemplated. For this, what amounted, in my opinion, to a new contract was entered into, and a contract price, a new and different consideration, was fixed upon. It does not appear to me to be of importance whether it was an arrangement to work under the original contract, or whether, strictly speaking, a new contract was entered into. For my own part, I think it was a new contract that was entered into. The obligation which was created was not, in my opinion, an obligation under the original contract, but under the new contract to do other and different work from that contemplated by the original contract, for, as I have said, a new and different consideration. Pumping was provided for in this new contract, and the contractor

did the work and received the contract price. Now, what happened? It was found in doing the work referable to the new contract or arrangement, that more pumping, considerably more pumping than what was contemplated by the new contract, was necessary, and it was for the expense of this extra pumping, as I was informed more than once by plaintiffs' counsel, that this action was brought. At this stage we arrive at the crisis of this case. The plaintiffs insisted that the defendants were bound to pay for the extra pumping. The defendants said: "No, it was occasioned by the new works, and you got what you said you would take for the new works, the contract price for which included allowance for pumping." "You," said the defendants, "are claiming to make us pay for pumping because it proved to be more burdensome and expensive than you anticipated. We decline to do so."

Then was made for the first time the belated discovery of fraud. "We have now got your letters," said the plaintiffs, "and they show that you were guilty of fraud, because they prove that you were reckless as to whether the representations you made were true or false." I fear that this imputation of fraud rudely closed the door on further negotiation and compromise; and I say so regretfully, because, undoubtedly, the plaintiffs did their work well.

This brings us to the issue to be determined in this case—whether there was evidence of fraud proper to be submitted to the jury; not whether the defendants were, in fact, guilty of fraud, but whether there was evidence that they were guilty. I am of opinion no such evidence existed. In my opinion, the fallacy in the argument addressed to us on behalf of the plaintiffs rests on a persistent and inveterate disregard of the obligation of the plaintiffs as to tender, which was most clearly expressed in the 43rd clause of the specification. Perhaps I am wrong in saying that this article was entirely disregarded. There was a suggestion made as to its meaning—a suggestion, in my opinion, of an utterly futile character, to which I shall advert later on. Before I read that all-important clause—and it must be read in connexion with the 4th clause—I desire to refer to the examination, or rather, I should say, to the cross-examination, of Mr. Hellins. So torrential was his cross-examination that I believe, had he been standing up,

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and not sitting in the witness-box, he would have been swept off his feet. On the whole, I think he bore the pitiless pelting of the ordeal to which he was subjected well enough. I think the general result of his evidence was this—that there was no warranty or guarantee of the truth of the representations made, and that it was not intended that these representations were to be acted upon by the contractor, and they were not, therefore, representations upon which an action for fraud could be founded. "No doubt," he said, "I made them for the purposes of tender"; but it is plain that he meant in this sense—that they were to be used only subject to the conditions of the specification. The drawings and plans were in the nature of an advertisement for a contractor and of the scene of his operations, and of the work to be done; but the plans and specification being regarded together, as it was provided they should be, showed that the drawings and plans were not to influence the contractor for the purpose of tender unless he made them, so to speak, "his own information" by verifying them. The plans and drawings might be truly described as a speculative picture to give a view of the general position—materials upon which the contractor might, if he so desired it, by checking and verifying them, exercise his special function under the 43rd clause of the specification; and it is, in my opinion, by ignoring that function, so very explicitly imposed, that they now seek to make a case of fraud against the defendants. To prevent mistakes, and to prevent a contractor tendering on a false basis, and to protect themselves—to protect at once the contractor and themselves—to define with exhaustive accuracy where the responsibility as to tender should lie, and to preclude any miscarriage being in any way ascribed to them, the Corporation introduced the 43rd clause into the specification. This was plainly to show, so far as they the Corporation were concerned, that in anything in relation to tender there was to be no warranty, no guarantee, no representation that was to be acted upon; and it was to preclude the raising of any such question, however it might be raised, that the 43rd article was framed. The contractual relation between the defendants and the plaintiffs was that the plaintiffs were to be precluded from asserting that any representation to be acted upon for the purpose of tender was made by the defendants to the plaintiffs.

What, then, is the 43rd article of the specification, which must be read in connexion with the 4th and some of the other articles, but especially the 4th? It is as follows:—"The contractor is to *satisfy himself* as to the dimensions, levels, character, and *nature of all existing works*, buildings, roads, lands, waterways, sewers, pipes, the nature of the strata through which the excavations are to be made, and all other things so far as they may have any connexion with the works in the contract, *and is to obtain his own information on all matters which can in any way influence his tender.*"

This, then, is the 43rd clause. Could anything be clearer? In all matters relating to tender it was distinctly provided that the contractor should act for himself, by himself and his servants alone. So far from being thrown off his guard, as has been alleged, there was a distinct appeal to him to keep his guard. That was the very basis upon which he was to contract. It was expressly provided that the contractor was to obtain his own information on all matters which would in any way influence his tender. Indeed, I think the case might be described as one in which the plaintiffs, to save expense and trouble, took their chance, though it was specially provided they should not do so. Indeed, it appears to me that the position was rather calculated to render the servants of the Corporation less careful than they ought to be, because it was of the essence of the position that the plaintiffs should act for themselves—that in anything which could influence them as regards tender, they should themselves get for themselves their own information. Representations by or on behalf of the Corporation, however blundering or however precisely accurate, could not relieve the plaintiffs from their own very stringent obligation under the 43rd article.

It is not pretended that the contractor discharged his duty under this clause, and it is not denied that he would not have fallen into any mistake whatsoever had he done so. If he went astray, he did so by ignoring his own specially imposed obligation. This is not a case where anything was specially contrived to baffle, mislead, or trick the contractor after he had entered upon the discharge of his obligation under the 43rd article. It is not a question of so managing matters as to baffle the contractor in the course of his duty under the 43rd article whilst actually endeavouring to

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discharge it. This is a case of the contractor never having entered upon his duty, but totally ignoring it, and endeavouring to make representations—which he was distinctly warned (a warning which was intended to be, and actually was, contractually recognized) were never intended by the Corporation to be acted upon by him —the foundation of an action for fraud.

In the course of his very able argument I asked Mr. Gordon what his precise proposition was:—was it this—that there was evidence that the defendants defrauded the plaintiffs into overlooking their obligation, into disregarding their function under the 43rd article? Mr. Gordon answered that that was substantially his position. That position seemed to me to be wholly untenable, because it was the very one thing that the plaintiffs were told they should not do, and which they bound themselves by contract not to do. In fact, it was from start to finish of the very essence of their mutual relations that the plaintiffs should not disregard but should strictly regard their special duty and function under the 43rd clause.

This 43rd clause was a distinct appeal to the plaintiff to do his own duty, which it so clearly prescribed. It was at once a definition of obligation, and an appeal to discharge it; and it is upon the unwarrantable elimination of this 43rd article, with its definition of obligation and appeal, that the plaintiffs' case is founded.

But it was suggested—and this is the suggestion I said I would advert to—that the true function of the contractor under the 43rd clause of the contract was merely to correct what were styled "inaccuracies." I do not know what was meant by inaccuracies, for there was no definition of the term. I assume it means something different from "essentials." However, it is only necessary to read the 43rd article to see there is no foundation for this contention. What are the words? "The contractor is to obtain his own information *on all matters* which can *in any way influence* his tender." These words are absolutely inconsistent with the construction attempted to be placed on the article by plaintiffs' counsel. Indeed, the construction contended for would be in direct antagonism to the language of the section. It would involve this—that the obligation of obtaining all the essentials

which could influence tender should be borne by someone other than the contractor upon whom it was specially imposed. It appears to me that the vice of the argument for the plaintiffs was attaching no meaning at all to the 43rd article, or a meaning that was absolutely futile.

I desire to refer on this point to some observations appearing in the speeches of the Lords in *Thorn's Case* (1). The case itself I know was different in its facts; of a different character; it was a case of alleged warranty, and not of alleged fraud, as this is; but the observations to which I am about to refer I think are relevant to the present case. Lord Chelmsford said:—"There can be no doubt that the plaintiff in the exercise of common prudence, before he made his tender, ought to have informed himself of all the particulars connected with the work, and especially as to the practicability of executing every part of the work contained in the specification, according to the specified terms and conditions." In the present case it was not a question of mere prudence; it was specially provided that the contractor should do this. "It is said that it would be very inconvenient to require an intended contractor to make himself thoroughly acquainted with the specification, as it would be necessary upon each occasion for him to have an engineer by his side. Such an imagined inconvenience is inapplicable in this case, as it appears that the plaintiff had his engineer, who examined the specification for him, though not carefully. But if the contractor ought prudently and properly to have full information of the nature of the work he is preparing to undertake, and the advice of a skilful person is necessary to enable him to understand the specification, is it any reason for not employing such a person that it would add to the expense of the contractor before making his tender? It is also said that it is the usage of contractors to rely on the specification, and not to examine it particularly for themselves. If so, it is a usage of blind confidence of the most unreasonable description." This is the clear and vigorous language of Lord Chelmsford.

In the case before us the plaintiffs did not verify the plans and

(1) 1 App. Cas. 120.

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drawings, and ignored the specification. The vigorous language of Lord Chelmsford would, I think, be still more vigorous if there was in *Thorn's Case* (1) any express provision analogous to the 43rd article of the specification in the present case. There are other passages in the speeches of the peers which are also in point.

It is not pretended that in this case there was any warranty. It is not pretended that there was any guarantee, nor in my opinion was there any representation by or on behalf of the Corporation intended to be acted upon. What the Corporation in effect said was :—" Here are the plans and drawings prepared by our servants; we in no way affirm their accuracy. Check and verify them for yourselves. That is your special function. That is the basis on which we deal. We are to deal on the basis that you are to obtain your own information on all matters which can in any way influence your tender." And because, in " blind confidence," in disregard of their special obligation, and to save trouble and expense, the plaintiffs acted upon representations which, as far as the Corporation or its servants were concerned, were never intended to be relied upon, at least, unchecked and unverified by the contractor, the plaintiffs, in their extremity, there being admittedly no warranty or guarantee, turned round and imputed fraud to the defendants. This imputation of fraud was the " loop-hole " said to be discovered at the last moment, by which the plaintiffs were to escape from the effect of their failure to discharge their own obligation under the 43rd clause of the specification. By this clause the Corporation did their utmost to protect themselves. By this clause, in words as clear as can be found in the English language, the special function of the contractor was indicated, and, in my opinion, the very presence of this clause wholly repelled the allegation of fraud, because it indicated most clearly that the representations in the drawings were not representations by the plaintiffs intended to be acted upon, at least when unchecked by the contractor. The cardinal fallacy of the argument for the plaintiffs is taking the case piecemeal, and not regarding it as a whole—not regarding the drawings and specification together.

(1) 1 App. Cas. 120.

Once the evidence is regarded as a whole, it is quite plain to my mind there was no evidence of fraud, and I wish it to be distinctly understood that I agree with the Chief Baron in thinking that the plaintiffs are precluded in point of law from saying there was fraud.

I entirely accept the view of the Lord Chief Baron in this respect. He said in so many words that the ground of his decision, his *ratio decidendi*, was that he could not take the plans *per se*; that he should take them as part of one consistent whole, and that it was by construing this consistent whole that alone he could find what was the legal effect of the statements contained in the plans; that his clear opinion was that, with the 43rd clause in the specification upon which the contractor was to make his tender, he was not entitled, in point of law, to say that he acted to the extent of a hair's breadth upon the statements contained in the plans. That he was told he should act upon his own judgment and satisfy himself as to the dimensions, character, and nature of the existing works. In this I entirely agree. So strong was the Lord Chief Baron on this part of the case that he said that it was too plain for argument.

As to the argument founded upon the 48th article of the specification, it is, no doubt, a somewhat awkwardly drawn article; but it must be read with the 43rd article, which provides that in all matters which could influence him as regards tender, the contractor must obtain his own information; and I cannot at all read the 48th section as diminishing the contractors' responsibility under that section. The 48th section cannot, in my opinion, be construed as intended to be a direct categorical statement, intended to be acted upon, that the defendants were in possession of information in relation to the matters mentioned in the 48th article. I adopt Serjeant Dodd's contention with reference to it, that its object and effect were not to increase the liability, or to impose any additional liability, upon the defendants, but were a further qualification of any representation by the defendants in reference to the particular drawings referred to in it. These drawings were already covered by the 43rd article, and the object of the 48th article was to render assurance doubly sure.

I agree then with the opinion of the Lord Chief Baron so far

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as relates to the grounds upon which he directed a verdict for the defendants.

I come now to a part of the case as to which I, with great deference, differ from my Lord Chief Baron. Serjeant Dodd submitted that as the plaintiffs had entered into a new contract to execute the works for which the £36,374 was claimed, and as the price fixed by that contract had been paid; there was no evidence that the plaintiffs had sustained any damage by reason of the alleged representations. This argument was pressed by Serjeant Dodd with much insistence before us. I am of opinion that the requisition, in this respect, of the learned Serjeant was well founded, and should have been complied with by my Lord Chief Baron. The Lord Chief Baron did not decide the point, as he was in favour of the defendants on another ground; but by what he said he showed that the inclination of his opinion was that Serjeant Dodd's contention in this respect was not well founded.

I am of opinion that the requisition should have been complied with, on the ground that there was a new contract in relation to the new works, and that it was by reason of the new works the extra pumping was necessitated. True, that in the new contract some of the prices were identical with the prices mentioned in the specification; the prices were to be identical so far as applicable; but this fact did not prevent what occurred amounting to a new contract. No doubt the ultimate object of the original and the new contract was identical; but, to adopt the language of counsel and the Lord Chief Baron, a back-bone had been found not to exist in the original plans—to use the language of Sir Weetman Pearson, the "essentials" were not there—and the object of the new contract was to make a plan with a back-bone to create a different basis of operations for a new and different consideration. The contractor miscalculated the amount of pumping that was requisite; and how, under the circumstances, the extra pumping was caused as a direct and proximate result by the fraud of the defendants in relation to the original contract, if any such fraud existed, I cannot see. A price was fixed upon, for which the new works, including pumping, were to be completed, and if more pumping than what was contem-

plated was requisite, and the price lower than it might have been, this appears to me to be the result of miscalculation and not of fraud.

No doubt what occurred might be popularly described as carrying out the old contract by a substituted method; but I do not think that is its true legal description. It was not an agreement to carry out the original scheme under the old contract. It was clearly a new contract to effectuate by a different work the original object. It was because the original contract broke down that the new one was entered into; it was, if you will, a new contract to effectuate the original object, but, nevertheless, it was a new contract. The word "scheme" and the word "contract" must not be confounded, and the words "original scheme" and "original object" must not be confounded. Here, in my opinion, though the object remained the same, the scheme and contract were different from those which originally existed. The ultimate object, no doubt, was the same, but the works were different. What Sir Weetman Pearson described as "essentials" were different, and there was an absolutely new consideration. It was not a mere variation of the details contemplated by the original contract. What occurred was a break-down in essentials, and there was a new contract to reconstruct the whole position. However, it does not really seem to me very important whether there was a new contract strictly so-called, or a new arrangement under the old contract. The arrangement, whatever it was, was agreed to by both parties, and it was miscalculation as regards the amount of pumping in relation to this, and not fraud, that necessitated the extra pumping.

I agree with what my brethren have said as to the inapplicability of the Public Authorities' Protection Act.

However, on the whole case, I think there ought to have been, as there was, a verdict directed for the defendants.

R. G. L. L.

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The defendants appealed (1).

Serjeant Dodd, C. A. O'Connor, K.C., Ignatius J. O'Brien, K.C., and *P. O'C. White,* for the appellants.

John Gordon, K.C., The Right Hon. J. H. M. Campbell, K.C., T. M. Healy, K.C., and *E. A. Collins,* for the respondents.

June 26.

SIR SAMUEL WALKER, C.:—

The only question in this case requiring serious consideration is, whether, at the close of the plaintiffs' case, there was evidence reasonably fit for submission to a jury to sustain an action of deceit.

It was admitted both in the King's Bench Division and here that the claims under the contract, or referential to it, could not be sustained, or had disappeared, and there remained only the claims under the 8th paragraph of the statement of claim.

It is unnecessary to recapitulate all the facts connected with the works, the subject of the contract between the plaintiffs and defendants, by which the plaintiffs, as contractors, agreed to execute certain outfall-works at the Pigeon-house harbour, forming part of the Dublin main drainage scheme.

The contract incorporates certain plans, specifications, and drawings, and they must be all read together; and it was undoubtedly the design, or hope, at the time tenders were being asked for, that a certain wall, then existing on the northern or River Liffey side of that harbour, should be utilised as a north boundary, or retaining, wall for the purpose of excluding the tidal waters of the river from the inner portion of the outfall-works; and by the contract the plaintiffs agreed to construct a concrete wall beside and against the inner surface of this north harbour wall, to serve as a lining or facing to the wall, for the purpose of preventing the escape of sewage-matter from the works; and it was agreed that this concrete wall should be as indicated on the plans, and that its exact profile should be determined by that of the existing wall when exposed by excavation.

(1) In the Court of Appeal, before SIR SAMUEL WALKER, C., and FITZGIBBON and HOLMES, L.JJ.

The 4th paragraph of the claim states that by the plans a section of the harbour wall, with its foundation, was purported to be correctly shown, from which it appeared that the foundations of this north harbour wall existed to a depth of at least 9 feet below Ordnance datum.

The 5th paragraph alleges that this wall and its foundations were not correctly shown on the plans, by reason of which the tidal waters of the river continually flowed in large volumes from the river under and through the wall and into the inner portion of the outfall-works, causing much flooding and necessitating much more pumping than would otherwise have been necessary; and then the 8th paragraph, which is the one framed in deceit, is as follows:—"In order to induce plaintiffs to enter into the said contract, the defendants, well knowing the same to be untrue, or with a reckless disregard whether the same were true or false, falsely represented—(1) that the structure and position of the said north harbour wall and its foundations were correctly shown on said plans, and that the foundations of said wall existed to the depth shown on said plans; (2) and that the said wall and its foundations were of a nature and structure adequate for excluding the tidal waters of said river, and for enabling plaintiffs to construct such outfall-works without difficulty; and (3) that the defendants had in their possession information as to the structure, nature, and position of the said wall and its foundations; and the plaintiffs were by such representations induced to enter into said contract."

It then avers their falsity, and alleges consequential damage.

I am willing to assume that in the present case a representation as to the north harbour wall and its character was made in the drawings and plans which form part of the contract, but the question is, having regard to the nature of the representation and the other statements made in the same contract, equally part of it, and germane to the representation in question, can it be said there was any fraudulent representation?

The test laid down by Lord Herschell in *Derry* v. *Peek* (1) was over and over again appealed to:—"Fraud is proved when it is shown that a false representation has been made (1) knowingly,

(1) 14 App. Cas. at p. 374.

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or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false, for one who makes a statement under such circumstances can have no real belief in the truth of what he states." It was not suggested that anything represented on the drawings or plans was knowingly false, but it was said the representation was made without any belief in its truth, and it was therefore fraudulent within the rule laid down by Lord Herschell; but if the statement be accompanied by a contemporaneous one in the same document that the party making it does not intend that the other shall act upon the representation, but shall form his own judgment and ascertain for himself how the matter really stands, so that the person making it shall in effect be treated as having made none to influence action, can it then be said there is any fraudulent or dishonest statement? It is material that the defendant in an action for deceit should intend that the statement should be relied on by the party to whom he makes it.

Bowen, L.J., in *Edgington* v. *Fitzmaurice* (1) says:—"In order to sustain his action, he must prove that there was a statement as to facts which was false; and secondly, that it was false to the knowledge of the defendants, or that they made it not caring whether it was true or false. For it is immaterial whether they made the statement knowing it to be untrue, or recklessly without caring whether it was true or not, because to make a statement recklessly for the purpose of influencing another person is dishonest. It is also clear that it is wholly immaterial with what object the lie is told."

"That is laid down in Lord Blackburn's judgment in *Smith* v. *Chadwick* (2), but it is material that the defendant should intend that it should be relied upon by the person to whom he makes it."

I do not say that there may not be a case in which if a man makes an express representation to another, false to his knowledge, for the purpose of influencing the conduct of that other, and intending it shall so influence him, and also makes an independent express statement that he gives no warranty, an action for deceit may not be brought to recover damages caused by the fraudulent representation.

(1) 29 Ch. D. at p. 481. (2) 9 App. Cas. 201.

But the application of such a principle to this case involves the consideration of what is stated in the plans and drawings, and the purpose and intention with which they were made, and the construction of the clauses of the specification which are incorporated with and govern the contract, and this leads to the consideration of what is stated in the drawings and specification. I shall only give a summary, as all these matters are fully stated in the judgment of the Lord Chief Baron and the Judges in the Divisional Court. It was, or was considered, necessary for the proper carrying out of this main drainage scheme that a large chamber should be constructed, with a concrete floor, on which would rest a number of precipitation tanks necessary for purification of sewage, and this chamber should, of course, be always dry.

It was considered from the knowledge possessed by some members of the Corporation, especially the late Alderman Meade —himself an eminent builder and contractor—that there existed near the Pigeon-house fort on the north side of the Pigeon-house wall an old harbour which might be utilized for this purpose. This harbour contained some 10 acres or 20 acres, and if it were made water-tight and its bed concreted, it would obviously be a useful part of the scheme, and its adoption lead to a saving of expense. The northern boundary of this old harbour, which was about 1000 feet in length, was in part—to the extent of some 120 feet—an open space to the river Liffey, and for the rest of the 1000 feet an existing wall. Of course, it was necessary to exclude the tidal water from this harbour. As regards the open space, this could only be done by constructing a new wall by means of a coffer-dam, and this work was contracted to be done. There remained some 880 feet, and the idea was that an existing wall forming the original boundary to that extent of the harbour should be utilized and made water-tight, and as it stood that it could be made water-tight by being lined on the inner surface with 2 feet of concrete, and that it extended deep enough into the river-bed to be capable when so lined of excluding the tidal water from the projected chamber. I shall assume that the plans convey a representation that this was an existing wall, and that it went down to the depth of 9 feet below Ordnance datum, and I further think that the existence of such a wall was con-

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sidered material to the scheme, as capable of being made effective by the concrete lining, and preventing water passing through the wall, and preventing it passing under the wall, and rising in the chamber. Much evidence was given as to the meaning of the dotted lines on the plan. I think the evidence on this part of the case given by the plaintiffs' witnesses is quite correct. They mean work below the surface of the ground. Well, the hopes or representations of the defendants proved unfounded. The wall in fact rested on the bed of the river, practically on the mud, and became useless for the purpose for which it was designed to be used. The Chief Baron sums up the situation very favourably for the plaintiffs when he says:—"These plans did represent that there was an existing wall there to the extent of substantially 9 feet below the Ordnance datum, and that the plans of these works were founded on the existence of that wall, and of its being, or being capable of being made, a water-tight wall." Thus it became apparent that the original plan could not be carried out. It is not material to consider whether the contractors could have said—The position in which we find ourselves is not the one we contracted for, and we decline to proceed. They did not do that. They treated themselves, as appears from the letters, as bound under the contract to adopt altered works, and to be paid for them at a rate to be fixed by the engineer under the contract. As to whether they could claim damages for false representation a claim was made, but allowed to stand over, and the works proceeded, and now we have to consider what representations were made, and whether under the circumstances an action for deceit can be based on them. I have already mentioned the three representations which are relied on, and are stated in the 8th paragraph of the claim. The first is probably the most material, viz., that they falsely represented that the structure and portion of the north harbour wall and its foundations were correctly shown on the plans, and that the foundations of said wall existed to the depth shown on these plans.

We have not to consider what the result would be if the case stood only on the plans; but they are only part of one contract, and the specifications which also form part of the contract must be read with the plans, in order to see whether there is any evidence

of a fraudulent representation in point of law, so as to found an action of deceit; and what appears to me the test is, whether, though representations may be made, it is also clearly conveyed to the contractor, in language which he must be taken to accept and be bound by, that the Corporation does not intend he shall act on the plans, but must act entirely on his own judgment, thus negativing the existence of one essential item in what is necessary to amount to fraudulent representation. [His Lordship read paragraphs 43, 46, 47, and 48 of the specification.]

Those statements are clear. They are prudent, and, I believe, usual; and they are just as much a part of the contract as is the representation which is found in the same contract on its construction. We have not to deal with the case of a representation false to the knowledge of the person who made it.

Sir Weetman Pearson's letter of 9th July, 1902, sums up the situation exactly, when he says:—"Doubtless, so far as the Corporation is concerned, the misrepresentation of which we complain was a pure mistake," "but," he adds, "we relied on it."

I am aware there is abundant authority for the proposition that if a man makes a false representation to another, on a material matter, it will be presumed that he intended that other person should act on it. But here the matter represented is not alleged to be false to the knowledge of the person who made it, and the person to whom it is made is told in the same document that he is not to act upon what the drawings represent, but in reference to this matter lying below the surface to investigate for himself. "We warn you," the specification says, "that you are not to act on our drawings and plans."

With regard to the second representation, I fail to see any evidence of it in either the contract, or plans, or specification. It would be very unlikely *a priori* that a representation could be found that the wall was water-tight, and still less a representation that the wall was sufficient to enable the plaintiffs to construct the outfall-works without difficulty. It lies on the plaintiffs to prove affirmatively the existence of any such representations; and the statement as to it in the pleadings seems to me to be a statement of an inference alleged to be found in what forms the subject of the

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said representation; but inferences and conclusions of such a character are met by the several clauses of the specification already referred to.

The third representation alleged is that the defendants had in their possession information as to the structure, nature, and position of the wall and its foundations, whereas they had not.

Now, the contract drawings Nos. 6, 9, and 10 convey apparently information as to the cross-sections and foundations of existing walls and works, and the nature of the ground inside the Pigeon-house harbour; but it was desired, perhaps *ex abundanti cautelâ*, having regard to clause 43, to state affirmatively that the Corporation were making any statements they did, not from knowledge, but from information such as they had, be the same more or less, and accordingly clause 48 says—"The information as to the cross-sections and foundations of existing walls and works, and the nature of the ground inside the Pigeon-house Fort on the contract drawings No. 6, 9, and 10, is given as the best in the possession of the Corporation, but the Corporation does not hold itself in any way responsible for its accuracy."

That furnishes an additional qualification, and was so intended on the construction of the documents.

So far from involving the affirmation of the possession of reasonable information, it negatives that, and affirms that all they say is from information only, and that they know nothing as a matter of fact. They disclaim all responsibility for accuracy, just as in paragraph 43 it is said—"The contractor is to obtain his own information on all matters which can in any way influence him."

Therefore they have over and over again shown that they will not make, and do not make, any representation which, as between them and the contractors, they intend shall be acted on by the contractors, and, therefore, there being no representation intended to be acted upon, there can be no fraud.

There was another ground strongly pressed as affording an answer to the action, viz., that in June, 1900, a new arrangement was come to between the contractors and engineer, that in consequence of the discovery of the non-existence of the wall, new works agreed to be necessary should be executed, and that the

contractors should be paid for them, and this was done and carried out. But it is quite plain on the correspondence that the contractors treated those substituted works as works to be done under the contract, the price of which it was for the engineer to fix under the contract. [His Lordship read the letter of the 1st June, 1900.]

If he had a vested right of action for false representation, there was no accord and satisfaction of it, nor is there any defence pleaded under that head, and in point of fact it was arranged that the new works should proceed, and the claim under the head of false representation stand over. It is contended that, as the plaintiffs have been paid for the new works, the claim for damages for the alleged representation must fail. But I agree with what seems to be the view taken by the Lord Chief Baron that the agreement can only be relied on as going to the amount of damages flowing from the representation, and cannot in law be treated as an accord and satisfaction of a cause of action.

The argument founded upon the new arrangement of June has found favour with the Lord Chief Justice. He says—"I am of opinion that the requisitions," *i.e.*, of Serjeant Dodd, "should have been complied with, on the ground that there was a new contract in relation to the new works, and that it was by reason of the new works the extra pumping was necessitated. The contractor miscalculated the amount of pumping that was requisite, and how under the circumstances the extra pumping was caused as a direct and proximate result by the fraud of the defendants in relation to the original contract, if any such fraud existed, I cannot see. A price was fixed upon to do the new works including pumping, and if more pumping than what was contemplated was requisite, and the price lower than it might have been, this appears to me to be the result of miscalculation, and not of fraud." There is much force in that reasoning. It is not material to come to a definite conclusion as to it, if the other grounds for directing a verdict for the defendants are well founded. I confess I think the reasoning of the Lord Chief Justice goes more to affect the question of damages than to furnish an absolute defence.

I do not think it necessary to say anything as to the defence founded upon the Public Authorities' Protection Act.

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Upon the whole, I am of opinion that the verdict should be entered for the defendants, as directed by the Lord Chief Baron.

FITZ GIBBON, L.J. :—

In this action the plaintiffs originally claimed two distinct sums of money—(1) £11,907 15*s.* 6*d.* for work done under a contract in writing for the construction of certain outfall-works at the Pigeon House, dated October 17th, 1899, extending and amending an agreement dated September 7th, 1899; (2) £36,374, which was alternatively claimed for extra works done under the same contract, and, under paragraph 8, as damages recoverable at Common Law for deceit.

The claim for £11,907 15*s.* 6*d.* was settled; the Chief Baron directed a verdict for the defendants upon the claim for the £36,374 as the price of extra works, because the condition precedent of an architect's certificate had not been fulfilled, and there was no evidence to sustain the reply that the certificate was wrongfully withheld. The appeal is confined to the direction for the defendants in the action for deceit.

Paragraph 8 alleges that cause of action in terms which correctly specify the issues which the plaintiffs must establish by sufficient evidence :—

> "In order to induce the plaintiffs to enter into the contract, the defendants, well knowing the same to be untrue, or with a reckless disregard whether the same were true or false, falsely represented that—(1) a certain north harbour wall and its foundations were correctly shown on the plans, and existed to the depth shown on said plans, and were adequate for excluding tidal waters, and for enabling the plaintiffs to construct the outfall-works without difficulty; and (2) that the defendants had in their possession information as to the structure, nature, and position of said wall and its foundations, and the plaintiffs were, by such representations, induced to enter into said contract; whereas the said wall and its foundations did not exist to the depth shown, and were not correctly shown on the plans, and were not adequate for excluding tidal waters, or for the construction of the works; and the defendants had not in their possession any information as to said wall or its foundations; and the plaintiffs were thereby hindered in the execution of the works, and suffered loss and damage to the extent of £36,374."

The Lord Chief Baron, holding that there was no sufficient evidence to sustain the cause of action thus alleged, directed a verdict and judgment for the defendants; and the proposition which the plaintiffs must establish is concisely stated in their notice of motion for a new trial, on which they succeeded in the King's Bench, as follows:—

> "That there was evidence in support of plaintiffs' claim in this action for damages for misrepresentation; and that the learned Judge should have submitted to the jury the proper issues arising in respect of such claim, and was wrong in withdrawing the case from the jury."

I do not propose to refer to any of the cases cited in the King's Bench or here, because I regard the law as well settled, and I could not add anything to the Lord Chief Baron's statement of it.

Whether the plaintiffs have discharged the burden of proof which rests upon them depends upon the facts of the particular case; upon the evidence considered with due regard to the substance, subject-matter, and effect of the contract between the parties; upon the terms and import of the representations made, and the state of mind, intent, and motives of those who made them; and upon all other circumstances material to the questions whether false and fraudulent representations were made; whether they were made with the intent of inducing the plaintiffs to enter into the contract; whether the plaintiffs were thereby so induced; and whether they thereby suffered pecuniary loss.

There is no evidence of any fraudulent act or intent of the defendants themselves; being a Corporation, they acted through agents in doing the acts complained of; but I assume that, in this case, the Corporation is responsible, so far as is consistent with the terms of the contract, not only for the acts, but also for the honesty of those who acted for it in preparing the plans and specification, in procuring the contract, and in carrying out the works. In other words, I assume, but I do not decide, that everything done by the employees of the Corporation was within the scope of their authority, and was done in the interest of the Corporation. In other words, I assume that the Corporation which claims the benefit of the works is responsible not only for the lawful and honest acts of its officers who procured the contract,

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but also for damages caused by any fraudulent acts by which it was procured.

The representations alleged to be false and fraudulent are two, distinct in character, and requiring separate consideration, viz.—(1) The representation in the plans as to the structure of the harbour wall; and (2) the representation as to the information upon which those plans were founded.

I do not waste time over details about the representation as to the structure; how far it represented "water-tightness," or a defined base to the wall; or how far the "dotted lines" shown below the surface of the mud qualified the representation of the existence of the wall, though they at least indicated that its existence had not been ascertained by actual inspection. The unquestioned direction on the counts in contract implies that there was no *warranty* of the existence of the wall shown. I am satisfied that the plans represent a wall that was not there, but whatever representation was made comes within article 43 of the contract, and is a representation "as to the dimensions, levels, character, and nature of the existing works, or as to the nature of *strata* through which excavations were to be made."

The Chief Baron said that he could not help coming to the conclusion that there was "a clear representation upon the plans that this wall went down to 9 feet below Ordnance datum."

I cannot go quite so far as he did in favour of the plaintiffs in thus interpreting the plans, but I entirely agree that they show a wall going down to 9 feet below datum, and describe it as an "existing wall." The distinction which I make may be metaphysical, but I think it important upon the question whether—or how far—the plans were prepared with the intent, or object, of inducing the plaintiffs to act upon them in making the tender. It is based on consideration of the nature, form, and subject-matter of the contract, and upon the way in which acting on any inaccuracy in the representation which was made must have affected the interest of the contractor, independently of the qualifying effect of conditions 43 and 48, which I must consider separately.

This wall was metaphorically called the "back-bone" of the whole design; it was "of the essence of the scheme," because the feasibility of the specified works depended on its existence.

The scheme was, in substance, to turn the harbour into a *watertight cesspool* of the depth shown; if it could have been carried out, the works would have cost much less than they must have cost, if the harbour wall could not be utilized, *so far as it went*, as one side of the cesspool.

The contract price was not a fixed sum; it was based on "measure and value," according to a schedule of prices to be paid for the quantity of *work actually executed*. The specified works, being a mere lining of the wall, could be executed only to the depth to which the wall shown on the plans actually went down. The contract did not bind the contractor to overcome, at his own expense, or at all, any difficulty that might arise from the non-existence of the wall. He might lose the profit of lining the wall, but he was not bound to go to any expense in building anything in its place, where it did not exist. No doubt, the defendants engineers showed this wall, because, if the specified works could have been carried out, the cesspool would have been "a cheap job." But the cheapness would arise, not from cheating the contractor, but from utilizing the structure which was shown on the plans as "an existing work." "Assumption" rather than "representation" seems to me to describe the character of the statement made on the plans. The real losers by the non-existence of the wall were the Corporation, and not the contractors.

Let me illustrate the importance of this distinction. It arises in many cases, large and small, in fact on almost every contract for work to be done in altering, enlarging, or improving old buildings. A man wants to turn an old castle into a modern dwelling-house. He prepares plans upon which tenders are to be invited. He shows the existing work, so far as he has seen it, by firm lines, and he indicates what he cannot see, but what he assumes to exist, by dotted lines. He may lawfully invite tenders of a lump sum for constructing what he wants; he may lawfully stipulate that the contractor shall complete the work, and shall take the risk—for a fixed price—of having to overcome any difficulties unexpectedly arising from the condition or stability even of what is seen. Such difficulties frequently arise from the hollowness of walls or the unsoundness of materials which are visible; or they may arise from the failure of unseen portions to

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answer the expectation that they will carry the new work. If a contractor chooses to tender on those terms, the employer will get a "cheap job" at his expense. The *Blackfriars Bridge Case* is one striking instance of this: another occurred in an unreported case within my own knowledge, where the contractor for the Boyne Viaduct became bankrupt from having to spend £70,000 in finding a foundation for a single pier, where the engineer's plans showed a *stratum* of rock under the river.

But if the contract is framed as it was in this case, the cheapness disappears so soon as the misrepresentation is discovered, and the employer has to face a bill of *extras* for whatever substituted works are rendered necessary by the error of judgment, over-confidence, or even recklessness, of his architect whose plans prove incapable of execution.

This seems to me to be a most material element in ascertaining the motive or intent of the framers of the plans, and it goes a long way to negative any intent of defrauding the contractor.

The evidence in this case as to the frame of mind of the three authors of the plans, falls far short of proving knowledge that anything shown did not exist; it only shows that they were imprudent—reckless if you will—in preparing the plans upon an assumption which gave their employers the chance of finding that the wall, which they saw down to low water, and which so far looked substantial, went down so much farther, or was of such solidity, as to make it a fit backing for the work for which the tenders were invited. The brunt of the disappointment of their groundless expectations fell, and from the very nature of the contract it must have fallen, upon the employers, and not upon the contractor, who, under the terms of the contract, must have become entitled to payment for whatever works it became necessary to substitute for the cheaper, but unfortunately impossible, scheme shown on the plans.

That the architects knew that the wall was not there, or had no belief whatever that it was there, in short, that the representation of the wall as going down 9 feet below datum was a *subjective*, as well as an *objective* lie, is not proved. The plaintiff's allegation amounts to a charge of criminal fraud; it would, in any case, require clear proof to sustain it, and having regard to the "essence

of the scheme," to the substance of the contract, and to the obligations of the contractor, the fraud imputed to the architects seems to me to be so impossible of attainment, *as against him*, if there had been either knowledge that the wall did not exist, or no belief that it did exist, that no reasonable jury could find this vital issue for the plaintiffs.

If liable to anyone, these architects seem to me to be liable for unskilfulness, negligence, or recklessness, to their own employers, whom they put to the cost of attempting a "cheap job" that was impossible, and of ultimately paying for the substituted or additional works which its failure rendered necessary.

This is not *deceit*. If it were actionable, the Corporation, not the contractor, could sue; and the citizens would be the sufferers. "*Quicquid delirant reges, plectuntur Achivi.*"

The plaintiff's contention, from my point of view, appears to be based on Lord Bramwell's "confusion of unreasonable belief as evidence of dishonesty, and unreasonable belief as itself a cause of action." The unreasonable credulity of the architects was insufficient as evidence of dishonesty, and in itself it gave no cause of action to the contractor, whatever it might give to the employers.

As to what has been called the "new contract," I agree with the Chief Baron, and I cannot follow the Chief Justice in holding that it can furnish a defence to the action.

When it was discovered that the supposed wall did not exist, the contractor might perhaps have said *non haec in foedera veni*, and might have claimed to be paid *quantum meruit* for what he had done in the vain attempt to carry out the impossible project of the officers of the Corporation. But he did not do so: on the contrary, he undertook to execute other works instead, which were substituted under the stipulations of the original contract, for prices fixed in the manner thereby provided.

If an action of deceit lay against the Corporation for damages for fraudulently inducing the plaintiffs to enter into the original contract, the fact that they had executed substituted works under it before they learned that they had been cheated, could not take away their cause of action. But any expense for "temporary works" which they incurred in carrying out the substituted

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works for prices which were fixed after the non-existence of the assumed wall was known, and which included remuneration for completing those works at the contractor's risk, could no longer be attributed to the fraudulent concealment of its non-existence.

I do not follow the argument that extra pumping which was found necessary in executing the works which were substituted after the non-existence of the wall was known, could be recoverable as damages for deceit. In the original specification, "temporary works," including scaffolding, pumping, and other incidental operations, were covered by the tender prices, *per quantity*, of "excavation" and "construction." With knowledge that these temporary works, so far as they consisted of pumping, were going to be much greater than they would have been if the wall had existed, the prices of the substituted works were made higher than they would otherwise have been, and apparently for the purpose of concealing the serious effect of their own miscalculations, the architect and engineers connived with the contractor in describing, measuring, and paying for substituted works as "excavation," which really were not excavation in the proper sense, at higher rates which, to some extent, if not to the full extent, covered the cost, and expressly covered the risk, of the necessary pumping.

All these observations support the main foundation of the Chief Baron's conclusion, in which I agree, namely—that the plans and specification and conditions together constitute one single contract, and that this contract contains an express stipulation—which was lawful unless it was knowingly false and intentionally fraudulent, which is not proved—and this stipulation negatives, in my opinion, as in that of the Chief Baron, any intent on the part of the Corporation to induce the plaintiffs to act upon the plans as a representation.

> "CLAUSE 43.—The contractor is to satisfy himself as to the dimensions, levels, character, and nature of all existing works, &c., and all other things, so far as they may have any connection with the works in the contract; and is to obtain his own information on all matters which can in any way influence his tender."

I do not know what words an employer could use to negative

intent that any information given by him should induce the contractor to lower his tender, if these words have not that effect. I can find no "loop-hole" in the structure of this clause. It is a contractual *murus aheneus* from which there is no escape, short of proof that it is itself a *conscious* fraud. So far as the representation of existing works upon the plans is concerned, I hold, without doubt, that the contractor who accepted this stipulation cannot allege either that it was made by the Corporation with the intent that he should act upon it to his loss, or that he himself was influenced by it in making his tender.

It only remains to consider the representation as to information.

> "CLAUSE 48.—The information as to the cross-sections and foundations of existing walls and works, and the nature of the ground inside the Pigeon-house harbour on the contract drawings Nos. 8, 9, and 10, is given as the best in the possession of the Corporation, but the Corporation does not hold itself in any way responsible for its accuracy."

This must mean the accuracy of the *information*; therefore the Corporation directed attention to the very point at issue, and expressly disclaimed any responsibility whatever for the accuracy of that information. This, if possible, strengthens the affirmative force of clause 43, which bound the contractor to obtain "his own information," by stating that whatever information was given by the drawings "as the best in the possession of the Corporation" was so untrustworthy that the Corporation did "not hold itself in any way responsible for its accuracy," and still held the contractor bound "to obtain his own information on all matters" relating to the existing works "which could in any way influence his tender."

Among the things specifically shown upon the plans are the number and positions of certain trial borings; these stand upon the same footing as the representations of the visible pier. There are no "dotted lines" about them; they amounted to a positive representation that these borings had been made, and if that had been false, it would almost necessarily have been false to the knowledge of those who put them on the plans. But it is not suggested that either the fact or the result of any of these borings is misrepresented. In the interest of common honesty, I repeat my disclaimer of any intention to hold that such a representation,

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wilfully made with knowledge of its falsehood, could be rendered not actionable by inserting a condition, as fraudulent as the representation itself, that those who made it should not be answerable for it, but the plaintiffs have failed to prove any such representation.

My judgment rests on the propositions of fact—(1) That no representation was made by the Corporation, or by its authorized officers, which was either actually known to be false or was made without any belief that it was true; and (2) That the representations which were made, though made without sufficient grounds, and made with the intention that they should be acted upon to the extent of attempting to execute works which would have been feasible if the expectations of the architects had been well founded, were, by the express terms of the contract, qualified by a statement that those representations were only based upon information for the accuracy of which the Corporation was not to be responsible, and by a stipulation that the contractor should not act upon them in making his tender, but should base it on his own information and on nothing else. Therefore, in my opinion, these representations were not made with the intent to deceive. My opinion is, that nothing short of proof of conscious fraud can sustain an action of deceit upon such a contract as this; that of such fraud there was no sufficient evidence; and, therefore, that the appeal must be allowed with costs, discharging the order of the King's Bench, and restoring the judgment of the Lord Chief Baron.

HOLMES, L.J.:—

This action has arisen from a contract made by the plaintiffs and the defendants, by which the former undertook to carry out works of considerable magnitude in connexion with the main drainage scheme for the city of Dublin, at the price of £94,000.

Part of this scheme consisted in utilizing an old harbour of some acres in extent situated near the Pigeon-house fort for the purification of the drainage before its discharge into the river, and for this purpose to construct therein a series of precipitation tanks. Accordingly tenders for this work were invited on the basis of

elaborate plans and specifications prepared by the officers of the Corporation. These officers were Mr. Harty, the chief engineer; Mr. Chatterton, consulting engineer; and Mr. Hellins, who was to have the immediate superintendence of the works.

In July, 1899, the plaintiff company sent in a tender which was accepted by the defendants; and a formal contract was entered into on the 7th October following, with which the specifications, the conditions attached thereto, the bills of quantities and schedules of prices were incorporated. In carrying out this contract there arose great and unexpected difficulties necessitating much extra work, and causing considerable delay in its completion. The end came at length, and with it certain claims by the plaintiff Company, for the settlement of which the present action has been brought. Originally there were several causes of action, but before the case came into this Court, all but one had been finally disposed of. The only remaining claim is for damages said to have been caused to the plaintiff Company by a false and fraudulent representation contained in the plans, upon the faith of which the tender was made and the contract entered into. The evidence given at the trial and the authorities bearing on actions of deceit have been examined so exhaustively by the Judges who have already considered the case, as to relieve me from any detailed reference thereto.

I propose to confine myself to one ground, on which I hold that the defendants are entitled to judgment, and having decided in their favour on this point, I deem it unnecessary to refer to two other defences relied on by their counsel.

The nature of the alleged misrepresentation can be explained in a few sentences. It was a necessary condition to the construction and maintenance of the precipitation tanks on the site selected for them to exclude all water from the old harbour. For this purpose the contract provided, amongst other works, that the mouth of the harbour, which was about 120 feet in breadth, should be closed by means of a coffer-dam, and it was assumed that this, taken in connexion with an existing wall 25 feet wide, and running from east to west for about 800 feet, would be a good protection against the river on the northern side of the harbour, and effectually keep out the water in that quarter. There is nothing in the

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contract, or in the documents incorporated therewith, from which it could be inferred that the wall in its then state was actually watertight; but inasmuch as the specification provided that it was to be lined with concrete to the thickness of 2 feet, it might naturally be supposed that when thus strengthened it would prove an effective barrier against northern waters. It is admitted that if this wall would not be sufficient for the contemplated purpose, great additional expenditure would be required, and that a contractor would be greatly influenced in making a tender by his opinion of its sufficiency.

The wall, of course, appears on several of the plans, and I understand that it is always shown, as far as the Ordnance datum, by a firm, continuous line, and that for 9 feet below the Ordnance datum it is delineated by dotted lines. The works were begun soon after the execution of the contract; and in May, 1900, the mouth of the harbour was closed by means of the cofferdam, but it was found that water in large quantities came through, or under, the northern wall. It was then discovered that the Ordnance datum practically marked its foundation, and that it was not continued below that point as shown by the dotted lines. This necessitated a fundamental change in the work contracted for. Sir Weetman Pearson suggested certain alterations which appeared to him to be both economical and practical, and his suggestion was adopted by the defendants' engineers. There has been considerable argument as to whether what then happened amounted to a new and substituted contract, or a variation of the original contract pursuant to clause 8 of the specifications; but as this does not affect the conclusion to which I have come, it is unnecessary for me to consider the matter.

The result of the change of plan was disappointing. Water continued to pour into the harbour in large quantities, and extensive additional work was needed before a dry site for the tanks could be obtained. For much of this work the plaintiffs have been paid at contract prices, and their present claim is confined to expenditure incurred by them for pumping. In the original schedule of prices there was no separate item for pumping, the price of which was included in the charge for excavation, and was

estimated by the plaintiffs at the time of the tender at £748. They say that this modest sum would have been sufficient if the wall had been raised on a foundation 9 feet below Ordnance datum; and the actual cost of pumping, which is alleged to have amounted to £19,000, was, to a large extent, if not altogether, incurred in getting rid of water which would not have found its way into the harbour if the wall had been as it was represented on the plans.

The misrepresentation relied on was that there existed these 9 feet of wall; and I am of opinion that if this was actionable misrepresentation, the plaintiffs acted on it in making their tender, and suffered thereby some loss, although, for reasons not necessary to mention, it probably fell short of £19,000.

At the close of the plaintiffs' case, I think that the principal evidence relied on by them, for showing that the representation as to the wall was false and fraudulent, was that contained in three letters written by Mr. Hellins, the defendants' resident engineer, dated the 7th June, 1900, 5th June, 1902, and 10th November, 1902, which it is said convey that the defendants' engineers had no information about the foundations of the wall, and entertained doubts as to the existence of such foundations. These letters were, however, objected to on the ground that admissions or statements made by Mr. Hellins do not bind the defendants, and to meet this difficulty the plaintiffs' counsel were allowed to call Mr. Hellins as a witness. His evidence is not very consistent, and it is not easy to ascertain from the shorthand note what was its real purport, but I shall assume in favour of the plaintiffs when the meaning is doubtful. Expert evidence had been given to prove that dotted lines on plans merely convey that the work is underground or cannot be seen. Mr. Hellins, however, stated, both in his letters and in the witness-box, that they were used to show that not only the depth of the wall, but even its existence below Ordnance datum, was doubtful. At a later period of his examination he said that he intended to indicate on the plans the north harbour wall as an existing wall running down to a depth of 9 feet below Ordnance datum. I can find no evidence that Mr. Hellins, or any officer of the Corporation, made known their doubts to the plaintiffs, although the fact that there was no delineation of the base of the

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wall might suggest an absence of complete and positive information as to its foundation. What then might have been legitimately inferred by the jury from what was proved at the trial? I think that they would have been entitled to draw the inference that the defendants' engineers being in doubt as to the state or existence of the wall below Ordnance datum, and having no knowledge or information that would justify them in making any representation in reference thereto, rashly, and without inquiry, represented 9 feet of wall, where no wall existed. If there was nothing more in the case, and if the jury had drawn this inference, the result ought to have been a verdict for the plaintiffs, inasmuch as there would have been fraudulent representation within the legal principles laid down by the authorities referred to by the other Judges, and inasmuch as it is well settled that an innocent principal is responsible for deceit practised for his benefit by his agents acting in the course of their duty, the defendants would have been liable.

Therefore, if there was nothing more in the case, I should be of opinion that the Lord Chief Baron ought not to have withdrawn this issue from the jury. I understand that he would not have done so, were it not for clause 43 of the specification, which provides that "the contractor is to satisfy himself as to the dimensions, levels, character, and nature of all existing works—so far as they may have any connexion with the works in the contract—and is to obtain his own information on all matters which can in any way influence his tender." I take also in connexion with the foregoing, clause 48—"The information as to cross-sections and foundations of existing walls and works, and the nature of the ground inside the Pigeon-house harbour on the contract drawings Nos. 8, 9, and 10, is given as the best in the possession of the Corporation, but the Corporation does not hold itself in any way responsible for its accuracy."

These provisions form part of the contract between the parties. Their meaning cannot be mistaken, and I am obliged to give them the effect attributed to them by Palles, C.B., and Lord O'Brien. It is to be noted that there is no evidence of any kind that the engineers of the Corporation knew or believed that the wall did not, as a matter of fact, run below Ordnance datum. If

they had so known or believed, the case would have been in a different position, for it might then be argued that, having made a statement, false to their knowledge, they introduced the clause into the specification to save themselves and their employers from the consequences of the fraud, thus making the stipulation part of the fraud. A representation is only actionable when the person who makes it intends that another should act on it, but how can there be such an intention when that other is told at the time of the representation that he must satisfy himself as to the truth and accuracy of what is represented? He is thus warned against acting on the representation, and it becomes a term of his contract that he is not to do so.

Deciding the case on this proposition, which can be briefly and, I think, clearly stated, I feel no temptation to enter on a lengthened dissertation on other topics, or to elaborate legal propositions which have been already fully dealt with.

Solicitors for the plaintiffs: *Casey & Clay.*
Solicitor for the defendants: *Ignatius J. Rice.*

R. D. M.

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1906.
Dec. 6.

KATE M. COLLINS *v.* DANIEL COLLINS (1).

Employer and workman—Accident arising out of the employment—Tortious act of a stranger causing injury—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1.

A was in the employment of B, a contractor, as foreman of sewage works. Certain pipes which had been laid in the street in the course of the work were wantonly broken. B directed A to protect the pipes, and whilst A was so engaged further damage was done, for which A, under B's direction, demanded payment from the wrong-doers. This led to an altercation, in the course of which B was struck and fell, and A, on going to his rescue, was stabbed and died:—

Held, that the death of A was not caused by an accident arising out of and in the course of his employment, within the meaning of the Workmen's Compensation Act, 1897, section 1.

APPEAL from the award of the County Court Judge of Cork, West Riding, upon a claim for compensation made by a dependant of a deceased workman, under the Workmen's Compensation Act, 1897.

The deceased workman, Michael Collins, was in the employment of the respondent, as foreman of sewage works in Castletown-Berehaven, for which the respondent was contractor. On the 26th June, 1905, a number of fishermen landed in the town, and wantonly broke some pipes that were being laid in the streets by the contractor. This occurred shortly before the workmen's dinner-hour. When the foreman returned from dinner, the contractor asked the foreman to protect the pipes whilst he himself was at dinner, and not to permit them to be broken. Another pipe was broken during this interval. On the return of the contractor the fishermen were asked by the foreman to pay for the damage to the pipes, and an altercation arose, in the course of which the contractor was struck in the face and slipped. The foreman came to his rescue, a scuffle ensued, and the foreman was stabbed in three

(1) Before SIR SAMUEL WALKER, C., and FITZGIBBON and HOLMES, L.JJ.

places, and bled to death. His assailant was subsequently tried and convicted for manslaughter.

Moriarty, K.C., and *George M'Sweeney*, for the appellant:—

The cause of the deceased workman's death was a felony, the author of which was tried and convicted; the death therefore was not the result of an accident arising out of the employment. *Challis* v. *London & South-Western Railway Co.* (1) is conclusive in our favour. No doubt, the injury there, as here, resulted from a tortious act, namely, the wilful dropping of a stone by a boy from a bridge on a passing train; but the Court, in awarding compensation there, held that the risk of such an occurrence was incidental to the employment of an engine-driver, distinguishing *Armitage* v. *Lancashire & Yorkshire Railway Co.* (2). It is impossible to contend that the risk of being stabbed in a drunken altercation was incidental to the deceased's employment. Such an occurrence could never have been in his contemplation on entering the employment. The facts of this case are stronger than those in *Armitage* v. *Lancashire & Yorkshire Railway Co.* (2), as in the latter case the injuries resulted from the tortious act of a fellow-workman; here the injuries were inflicted by a stranger.

[They referred to and distinguished *Brown* v. *Scott* (3), *Fenton* v. *Thorley* (4), and *Brintons, Limited*, v. *Turvey* (5).]

P. D. Fleming, K.C., and *O'Leary*, for the respondent:—

The death was caused by an accident arising out of and in the course of the employment. The foreman was directed by the employer to protect the pipes and to demand payment for the damage. It was this that led to the altercation, in the course of which the foreman was stabbed. The stabbing was an accident; it was an untoward event, not expected or designed: *Fenton* v. *Thorley* (4). The foreman acted on an emergency: *Rees* v. *Thomas* (6). *Challis* v. *London & South-Western Railway Co.* (1)

(1) [1905] 2 K. B. 154.
(2) [1902] 2 K. B. 178.
(3) 1 Minton-Senhouse, 11.
(4) [1903] A. C. 443.
(5) [1905] A. C. 230.
(6) [1899] 1 Q. B. 1015.

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shows that compensation can be awarded though the injuries resulted from a tortious act.

[They also referred to *Andrew* v. *Failsworth Industrial Society* (1).]

SIR SAMUEL WALKER, C. :—

We do not require to hear Mr. Moriarty in reply, as we are all of opinion that the occurrence in question here was not an accident arising out of the deceased man's employment. In order to come within the Act of 1897, it must have been one arising not only in the course of, but also out of, the employment. The word "accident" cannot be used in its dictionary sense; probably the nearest approach to a definition is something that occurs out of the ordinary course, causing injury.

The first question is—What are the facts? Because here, as in many other cases, the law will clear itself if we understand the facts. The deceased man Michael Collins, who was practically murdered in the legal sense, was employed by his relative, Daniel Collins, as foreman of certain sewage works in Castletown-Berehaven, for which the latter was the contractor; and in the course of the works a number of pipes were laid in the streets of the town. On the day in question a number of rowdies were in the town of Castletown-Berehaven, more or less drunk, I have no doubt, who broke some of the pipes which the deceased man had charge of under the direction of his employer. After the dinner-hour the employer asked the foreman to demand payment for the damage done to the pipes from the men who broke them. The latter were at first willing to pay, but finding the amount, perhaps, above their means, they refused to do so, and an altercation took place. The evidence is that the employer was seized by the coat by one of the men, and struck in the face; he slipped and fell; the deceased man went to his rescue, and they rolled over together, and, while in that position, one of the men drew a knife and stabbed the deceased man two or three times, and he bled to death.

Under these circumstances, was that, within the meaning of

(1) [1904] 2 K. B. 32.

this Act—the only question we have to consider—an accident arising out of and in the course of the employment? In my opinion, the case of *Challis* v. *London & South-Western Railway Co.* (1) is a distinct authority that it was not. That case imposed a limitation—and, I think, a wise and just limitation—on what is to be considered an accident arising out of and in the course of an employment. The injuries there, as here, resulted from a criminal act. The injured man was an engine-driver; whilst passing with his engine under a bridge a boy threw down a stone from the top of the bridge—a not uncommon thing, as it appeared to the Judges who tried that case, and as it appears to us, for a boy to do. The glass was broken, the driver's eyes were injured, and he subsequently died. The learned Judges had there to deal with the fact that the injuries were caused by a criminal act, and that being so, the question arose whether the case came within the Act of 1897. The three learned Judges were unanimous in deciding that it did. But why? Because they thought that the risk incurred by an engine-driver in passing under a bridge, from which a boy might drop a stone, was one reasonably to be contemplated by him in undertaking the employment; and therefore it was within the scope of the employment to be subject to such a risk.

For that reason only they held that the case came within the Act; and they distinguished the case from that of a grown man, a stranger, casting a stone under similar circumstances, and from such a case as that of *Armitage* v. *Lancashire & Yorkshire Railway Co.* (2), where A wantonly threw a piece of iron at B, and hit C, and it was held the Act did not apply. The language of Collins, M.R., is clear and explicit on this point. He said (3):—"I do not think that . . . we should be justified in leaving out of sight what is matter of common knowledge and experience in relation to the subject with which we are dealing; and therefore we must, I think, approach the question whether what occurred was a risk incidental to the employment of an engine-driver from the standpoint that a train in motion has great attractions for mischievous

(1) [1905] 2 K. B. 154. (2) [1902] 2 K. B. 178.
(3) [1905] 2 K. B. at p. 157.

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boys as an object at which to discharge missiles." Mathew and Cozens-Hardy, L.JJ., adopted the same view.

Applying the reasoning of that case to the one before us, could it be possibly said that it was an incident of the employment undertaken by the deceased man that there should be this fight on the street where the pipes were being laid, and that a drunken man should draw a knife and stab him? The mere statement of the proposition involves the answer that such a risk could not be incidental to the deceased man's employment. It is, on the contrary, startlingly repugnant to the nature of the man's employment, and what ought to be expected to accrue in the course of it.

I am of opinion that *Challis's Case* (1) substantially rules the present one, and that the award of the County Court Judge must be set aside, and the appeal allowed.

FITZ GIBBON, L.J.:—

It is impossible to lay down any definition of "accident" which will cover all cases. Whether the injury is an accident is a question of fact, to be determined on the evidence and circumstances, and no one case can be more than an illustration of others.

I cannot understand how an occurrence could arise out of and in the course of a particular employment, unless it was something the risk of which might have been contemplated by a reasonable person when entering the employment as incidental to it. It could not reasonably have been contemplated by either the employer or the employed in this case, that amongst the risks incidental to the employment was that of the workman's being stabbed, as he was, in a drunken quarrel. That being so, the injury was not incidental to the employment, and the appeal must be allowed.

HOLMES, L.J., concurred.

Solicitor for the appellant: *P. J. Collins.*
Solicitor for the respondent: *P. O'Leary.*

R. ST. J. C.

(1) [1905] 2 K. B. 154.

In the MATTER of JEREMIAH A. HANAFIN, a Bankrupt (1).

Appeal.
1906.
Dec. 6.

Practice—Local Bankruptcy Court—Appeal from—Costs.

Where, on the determination of an appeal from an order of a Local Bankruptcy Court, the Taxing Master is directed to tax the costs of and incidental to the proceedings in the Court below and of the appeal, it is the duty of the Taxing Master to tax such items as relate to business transacted in the Local Bankruptcy Court, and such items as relate to the appeal, according to the scale of fees respectively applicable to such items, and it is not necessary that the former items should be referred to the Local Registrar for taxation.

Motion on notice.

By an order of the Court of Appeal dated the 28th day of June, 1906, made on the hearing of an appeal by one Richard Huggard from an order of the Cork Local Bankruptcy Court in this matter (the facts of which are immaterial for the purposes of this report), it was (*inter alia*) adjudged "that the said assignees do pay to the appellant, Richard Huggard, his costs of and incidental to the proceedings in the Court below and of this appeal, when taxed by the Taxing Master."

The Taxing Master having refused to tax items 1 to 60 of the bill of costs furnished on behalf of the said Richard Huggard, and other items dependent thereon, the said Richard Huggard duly lodged his objection to the said disallowance, whereupon the Taxing Master reported as follows as to the grounds and reasons of his decision on the said objection:—

"Objection as to items 1 to 60. These items relate exclusively to business transacted in the said Local Bankruptcy Court, and items 74, 83, 85, 99, and 101 are dependent thereon.

"Rule 74 of the Rules for the Local Bankruptcy Courts in Ireland, dated the 28th day of December, 1888, prescribes that 'all bills and charges of solicitors . . . in matters of bankruptcy

(1) Before Sir Samuel Walker, C., and FitzGibbon and Holmes, L.JJ.

Appeal. 1906. *In re* HANAFIN.

or arrangement, shall be taxed by the Registrar, or by such other officer as the Court shall direct, according to the scale in the first schedule hereto where applicable.'

"'*Registrar*' shall mean the Local Registrar of any such Court. (See Order under the Local Bankruptcy (Ireland) Act, 1888, dated the 18th day of March, 1889, incorporated with the said Rules.)

"'*The Court*' shall mean the Local Bankruptcy Court having jurisdiction in the matter. (See Rule 1 of the said Rules of 28th day of December, 1888.)

"Items 61 to the end of the costs relate to the charges conversant with the appeal, and I have taxed them without objection by either party.

"The order of the Court of Appeal as to costs is as follows:—'It is ordered that the said assignees do pay to the appellant, Richard Huggard, his costs of and incidental to the proceedings in the Court below and of this appeal, when taxed by the Taxing Master.'

"The costs of the proceedings in the Court below and of this appeal have been lodged in the Consolidated Taxing Office in one continued bill written bookwise. I beg to refer to it. General Rule No. 1 of the first schedule referred to in the said Rules of the 28th day of December, 1888, prescribes that 'all bills of costs . . . are to be written on cost paper on one side only. . . .' This follows the practice in the Dublin Court, in order, I assume, that Bankruptcy bills of costs shall be of record on the file of proceedings; and in any event it seems to me to be essential that a separate bill should be furnished in relation to the costs incurred in the Court below under the circumstances I have stated.

"But the assignees contend, and I think rightly, that the expression 'Taxing Master' in the said order of the 28th day of June, 1906, means 'proper officer'; and that having regard to the Rules and practice hereinbefore referred to, the costs of the proceedings in the Court below should be taxed by the Local Registrar and filed in the office of that Court.

"I accordingly overrule the objection.

"JEBU MATTHEWS, *Taxing Master.*"

Richard Huggard now applied to the Court of Appeal for an order that the Taxing Master should tax the appellant's costs of and incidental to the proceedings in the matter in the Court below in accordance with the order dated the 28th day of June, 1906.

Jonathan Pim, for the applicant:—

It was the duty of the Taxing Master to tax all the costs incidental to the proceedings, applying to the costs in the Court below such scale of fees as would have been applied by the Local Registrar if there had been no appeal.

[FITZGIBBON, L.J.: The case is analogous to that of the taxation of Parliamentary costs which was recently before this Court: *Lurgan Rural District Council* to *Moore and Johnston* (1). Is it not every-day practice in the case of remitted actions that two separate scales of fees should be applied, one to the costs incurred in the High Court, and the other to those incurred in the County Court?]

R. Doyle, for the assignees.

SIR SAMUEL WALKER, C.:—

We will make an order that the Taxing Master do proceed to tax the costs in this Court and in the Court below according to the scale applicable to such costs respectively. The appellant will be entitled to his costs of the motion, if there is any fund to meet them; otherwise he must abide his own costs.

Solicitors for Richard Huggard: *Molloy & Molloy* and *J. C. & A. Blake.*

Solicitor for the assignees: *William Morrogh.*

R. ST. J. C.

(1) [1906] 1 I. R. 599.

K. B. Div. 1906. Dec. 5, 6.

JAMES DOUGLAS FLETCHER, HENRY ALEXANDER LINDSAY CARNEGIE, JOHN LITTLE MOUNSEY, AND KEITH RAMSAY MAITLAND (REPRESENTATIVES OF F. C. FLETCHER, DECEASED), APPELLANTS; THE COMMISSIONER OF VALUATION IN IRELAND. RESPONDENT (1).

*Valuation—Buildings—Principle of assessment—Cost of construction—Evidence of letting value—*15 *&* 16 *Vict. c.* 63.

In valuing premises consisting of a dwellinghouse, a percentage on the actual cost of construction cannot properly be taken as the sole basis of assessment, when there is evidence of letting value and of expenses of repairs, insurance, and up-keep, of the premises borne by the owner.

CASE STATED for the opinion of the Court by the County Court Judge of Meath. The case stated was as follows:—

1. On Monday, 25th June, 1906, this case came before me by way of appeal from the decision of the Commissioner of Valuation, dated 27th day of April, 1906, refusing to make any alteration in the valuation of the house, offices, and lands known as Ardmulchan, situate in the electoral division of Navan (Rural), Union of Navan, and County of Meath.

2. Upon the hearing of this appeal before me it was admitted that the requirements of the several Acts of Parliament regulating valuation appeals had been complied with, and that the parties to the appeal were properly before the Court.

3. The appellants' notice of appeal limits the appeal to the valuation placed upon the buildings, and is dated the 17th May, 1906.

4. The history of the lands and premises is as follows:—By conveyance of June 6th, 1900, and made between the Duchess of Hamilton of the one part, and Fitzroy Charles Fletcher of the other part, the Duchess of Hamilton conveyed to the said Fitzroy Charles Fletcher all that and those that part of the lands and

(1) Before PALLES, C.B., and ANDREWS and JOHNSON, JJ.

hereditaments of Ardmulchan, containing 296A. 3P. 20P., and all premises attached to or belonging to said lands, to hold the same unto the said Fitzroy Charles Fletcher, his heirs and assigns.

At the date of the said purchase there was upon the lands a well-built dwelling-house of three stories. In the year 1901 Mr. Fletcher commenced to demolish this house with a view to building a more commodious one, and at the time of his death, on 5th August, 1902, the new house was almost completed, and was actually completed in 1904 by the appellants, who are the trustees of the will of Fitzroy Charles Fletcher.

5. The valuation of the old house was £45 a year, and this stood as the valuation of the existing house until 1905, when it was altered to £250 by the Commissioner of Valuation, and against this valuation the present appellants appealed to me.

6. In all, £30,848 was expended upon the house and offices attached thereto by Mr. Fletcher and the appellants. The house, as it now stands, has six sitting-rooms, six family bedrooms, and a large range of out-offices, with stabling for twenty-one horses, and accommodation for the necessary staff of servants. The house is furnished, lighted with electric light, and has about 13¼ acres of gardens and pleasure-grounds. It is situated on the banks of the River Boyne, about a mile and a half from Navan town.

7. From time to time since the death of Fitzroy Charles Fletcher the house has been occupied by his widow (now Mrs. Redmond M'Grath) by leave of the trustees and appellants, and not at a rent.

8. Evidence was given by the appellants that several unsuccessful attempts had been made to let the house on lease for any term, and either furnished or unfurnished. The evidence showed that it is impossible to let the house in such a way, there being no demand in the neighbourhood for houses of this description as a permanent residence. The evidence further showed that the only way in which the house can be actually let is as a furnished residence, with the gardens attached, from October to March for the hunting season, and from June to October as a summer residence. If so let, the evidence tendered by the appellants proved that £300 is the highest rent that the house will command for the hunting season, and £150 for the summer season,

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making altogether an annual rent of £450, out of which the owner would have to pay all the outgoings, and keep up the gardens at his own expense. It was assumed that the gross annual value of the house was the rent which it would command from outside tenants if let in manner aforesaid. No evidence was given of its annual value to an owner occupying it as a permanent residence.

The appellants claimed that, in addition to other outgoings, the annual depreciation upon the furniture, the amount of the rent attributable to the furniture, and the cost of keeping up the gardens, should be deducted from the gross annual rent in order to arrive at the net annual rent in conformity with the Valuation Acts. The gross outgoings sworn to on behalf of the appellants were:—

Upkeep of buildings, ...	£50
Insurance, ...	20
Depreciation on furniture and interest on value of same,	150
Taxes on, say, £250, ...	42
Cost of garden, ...	150
	£412

9. The Commissioner of Valuation valued the premises upon the following basis:—

Cost of construction estimated at	£22,282
Valuation = 1½ per cent. upon such estimate, or	£334
Deduct 25 per cent., under sect. 20 of 15 & 16 Vict. c. 63, or	84
Leaving valuation, ...	£250

I was informed that residential houses are always valued upon this basis when there is no actual rent being paid, and I therefore adopted the figures of the Commissioner of Valuation; but being of opinion upon the evidence that 1½ per cent. upon the cost of construction was too high, I reduced the valuation to £210, and gave no costs to either party.

10. The question for the opinion of the Court is—What should be done in the premises?

Dated this 29th day of October, 1906.

(Signed), JOHN ADYE CURRAN.

Babington (with him *Herbert Wilson, K.C.*), for the appellants:—

Cost of construction is not a basis upon which to estimate valuation. No doubt, it was taken as a rough test in *The Queen* v. *The London School Board* (1); but then there were no materials for estimating the value according to the true statutory test, viz., "the rent for which, one year with another, same might, in its actual state, be reasonably expected to let from year to year." (Valuation Ireland Act, 1852, sect. 11.) Here there are such materials for part of the year, viz. £300 for the hunting season and £150 for the summer season, making together the annual rent of £450, and the Commissioner of Valuation cannot travel outside them.

The Hon. Cecil Atkinson and *Vesey Fitz Gerald, K.C.*, for the respondent:—

The statutory test of valuation cannot be applied here, as there is no evidence of the letting value of the house for the entire year. Therefore you must fall back upon cost of construction, which was the test applied in *The Queen* v. *The London School Board* (1), and in *Clive* v. *The Overseers of Foy* (2). "Where property is of a kind that is never let from year to year, recourse is sometimes had to interest on the capital value or on the actual cost of land and buildings as a guide to the ascertainment of the annual value. . . . Interest on the cost or capital value cannot be substituted for the statutory measure, but can be looked at as *prima facie* evidence in order to answer the question of fact what rent a tenant might reasonably be expected to pay": Ryle on Rating (1900 ed.), p. 157. But when, as here, the statutory measure is absent, we submit that the proper course is to take the capital value of the actual cost. In *The Liverpool Corporation* v. *The Llanfyllin Assessment Committee* (3), A. L. Smith, L.J., at p. 21, says:—"I think the amount of capital expended is admissible in evidence as a criterion by which to estimate that rent in the case of works like these which are incapable of being compared with other hereditaments which form the subject of the letting." [They referred to *The Queen* v.

(1) 55 L. J., M. C. 33. (2) 39 J. P. 774. (3) [1899] 2 Q. B. 14.

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The London School Board (1); the three cases reported together of *The London County Council* v. *The Churchwardens, &c., of Erith*; *The Churchwardens, &c., of West Ham* v. *The London County Council*; and *The Assessment Committee of St. George's Union* v. *The London County Council* (2); and Castle on Rating, p. 465, Title, "Country Houses."]

Babington, in reply :—

When you have the letting value for portion of the year, it is easy to arrive at the letting value for the entire year; and it is not correct to say that the statutory measure is absent. If cost of construction were to be taken in these cases, it would work out unequally; take the case of two houses of equal dimensions, one built in the county of Dublin near the city, and the other in the west of Ireland. The cost of construction would be about the same in each case, but the letting value would be very different. This example shows that the cost of construction can bear no necessary relation to the letting value. [He referred to *The Queen* v. *West Middlesex Waterworks* (3).]

PALLES, C.B. :—

We have heard this case very fully argued, and we are in a position to express an opinion upon it. Some matters are admitted. It is admitted, in the first instance, that the matter upon which the County Court Judge is to form an opinion is a matter of fact and not a matter of law. The only way in which the question of law arises is that the County Court Judge has told us the principle of law upon which he acted, and we, therefore, are to see whether that principle of law upon which he acted is correct.

We think it impossible, having regard to our jurisdiction being limited to questions of law, to read an essay for him that will lay down every principle of law that can arise applicable to the circumstances as they may be before him on the re-hearing of this appeal. All we can do is to see whether his present conclusion is

(1) 17 Q. B. D. 738. (2) [1893] A. C. 562. (3) 1 Ell. & Ell. 716.

correct, and if we are of opinion that it is not correct, then to send it back to him, indicating, as far as we can, the error that he has committed. Our decision is based entirely on the construction which we give to the 9th clause of the case, in which the County Court Judge says that "the Commissioner of Valuation valued the premises on the following basis," and in which he sets out the estimated cost of construction at £22,282, and ascertains the value of the house at 1½ per cent. upon the cost of construction, viz. £334. Then he deducts 25 per cent. under section 20 of 15 & 16 Vict. c. 63, or £84, by which he arrives at a valuation of £250. From that he makes no deduction, either in respect of up-keep, insurance, cost of repair, or any of the other matters that are specifically referred to in the 11th section. Then the case proceeds in these words:—"I was informed that residential houses are always valued upon this basis when there is no actual rent being paid, and I, therefore, adopted the figures of the Commissioner of Valuation; but being of opinion upon the evidence that 1½ per cent. upon the cost of construction was too high, I reduced the valuation to £210, and gave no costs to either party." In clause 10 he says—"The question for the opinion of the Court is, What should be done in the premises?" If he was right in acting upon that basis, what should be done would be to affirm his valuation. If he was wrong in acting upon that basis, we have nothing for it except to quash his decision and send the case back. Our construction of the words used by the County Court Judge is that the principle upon which he valued these premises was solely by reference to cost of construction, and that he did not take into consideration the evidence mentioned in clause 8 of the case. The question we have to determine is whether he was right in doing that; and we are all of opinion that he was not. We do not decide that evidence of cost of construction was not admissible as one circumstance; but what we do decide is that the learned County Court Judge should not have left out of consideration the evidence he received of the actual rent that might have been obtained upon a hypothetical letting of these premises for the two periods mentioned in that 8th paragraph.

I will say one or two words upon the grounds upon which we have come to this conclusion. The Act of Parliament says what

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is to be the valuation. It practically is the rent that can be reasonably obtained for the premises from year to year, or taking one year with another. All the cases agree that if evidence could be given of comparison of the circumstances of the particular mansion in question with other similar circumstances in relation to other mansions such comparison would be the first and principal mode of arriving at a proper result. No evidence is stated in the case as having been given by house agents or others as to the lettings of houses of this particular description, either for the entire year or for part of the year, in these hunting parts of the County Meath. All we do know is that it would have been possible to have let this house for two periods much less than a year at certain sums of money mentioned in the case. The argument put forward by Mr. Atkinson was that, as these two periods did not embrace the entire year, the case was one in which it was impossible to compare the letting here with other lettings, and that therefore the evidence as to letting value for parts only of a year was rightly not taken into consideration by the County Court Judge. I cannot help thinking that if the matter to be determined is the value of certain premises one year with another, and if you can arrive at that value for eight months out of the twelve—I cannot help thinking that you go some way towards arriving at a calculation of the value for the twelve months. Therefore, I think the learned Judge was wrong in not considering that evidence.

I wish to say a word as to the application of the evidence that was given. It would appear that the lettings from which these two sums of money would be received would be lettings of the house as furnished, with a condition usual in the letting of country houses that the tenant should have some benefit from the garden, and that the garden should be kept up by the lessor. Mr. FitzGerald was, in my opinion, right in saying that it is impossible that the element of the garden could be taken advantage of in the mode sought during the argument here. He mentioned yesterday that there should be an apportionment of the rent that would be applicable, and that the part applicable to the house as unfurnished should have been ascertained. In the same way, the learned County Court Judge ought to have obtained by the examination of witnesses what would be the probable sums

that might be obtained for these premises for the specified periods, supposing the tenant was not to have the benefit of the garden, so that the garden should be altogether excluded from the question of valuation, and that which will ultimately be material will be, not the gross sum, but the portion of it that might reasonably be expected to be obtained for the house, provided it were unfurnished, and that it had not the accommodation of the garden.

Of course, the amounts thus ascertained will be only elements towards arriving at the valuation. It is only one of the matters to be considered, and it is not to be assumed that the yearly value of this tenement, for the purpose of rating, is to be taken as only the aggregate of these two sums. In other words, it must not be assumed that the occupation of the lady herself, hypothetically deemed to be in possession for three months or five months, is to be deemed of no value whatever, and not to be taken into account; but I am of opinion that if you arrive at a value for eight months, or nine months, which are probably the most valuable months, having regard to the possibility of letting during the summer, and during the hunting season, it will not be difficult for the Commissioner of Valuation, or the Judge, to arrive at the value of the same premises during the other months of the year.

I do not conceive that any of the cases cited is inconsistent with our view, which is, that although evidence of cost of construction is not to be altogether excluded, it is not necessarily the sole basis of valuation in a case such as the present. Mr. Babington is right in saying that if cost of construction were to be taken with a calculation of interest at a *fixed* rate, you would value at the same sum a house in Dublin and one in the country which cost the same amount, although the experience of all of us is that the house in Dublin would be one that might be let at once at a high rent, whilst the other might be a drug in the market. But I need not pursue that further. There are certain cases in which the cost of construction, dealt with in the way in which it has been dealt with here, would be a satisfactory mode; but we hold that this case is not one of them. The first case is *The London School Board Case* (1). There, Cave, J., says:—"Their first

(1) 55 L. J., M. C. 33.

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contention was that interest on the cost was a test. It is a rough test undoubtedly." It would be a particularly rough test in this case, because in the case cited there was an assumption that the School Board would act in the cheapest and most economical way, while a man who is building a house for himself often does not do so. He goes on, "It is a test in some cases, but it is not a test in others. If the place is occupied by a tenant, it is not at all a good test, because the rent which he actually pays is a far better one. If the place is unlet, it is not a good test, because it may be that no tenant would give anything approaching to the interest on the cost. But if the place is occupied by the owner himself, then it is in some sense a test, a rough test no doubt, and only *prima facie* evidence, but still some evidence to show what the value of the occupation is—and for this reason; we assume, of course the case of a person, like the School Board, who is desirous of occupying the necessary buildings at the cheapest possible rate which is compatible with efficiency—and a person who is in that position will naturally look round to see how he can best accomplish his purpose." And for that reason we do not hold that this evidence is altogether inadmissible. If I were the tribunal, I would not attach one feather's weight to the cost of construction. I observe what the Commissioner has been obliged to do. He has been obliged to adopt, as the amount of the interest, 1½ per cent. That is not a commercial rate of interest. That rate of interest is not what it ought to be if the Commissioner of Valuation treated this as a commercial transaction, and as a case in which a certain expenditure ought to be expected to produce a certain commercial return. I would have thought that in some cases a very much better test would be to take the amount of purchase-money that would be obtained upon a sale of the demesne, with the house on it, and then to ascertain the amount of the purchase-money that would be obtained for the demesne were there no house on it. When the difference between these two sums of purchase-money was arrived at, you would have an element that might be taken into account, and dealt with in the way that the Commissioner has dealt with the cost of construction. For these reasons I hold that *The London School*

Board Case (1) is no authority for the proposition which has been urged here.

In *Reg.* v. *The London School Board* (2) it is stated, as a fact, that the estimate was fair and reasonable, and I take that as really meaning that the amount was expended in such a way that a fair return would be obtained for the expenditure by the right to occupy the building. That would not be 1½ per cent., or anything like it. But the only matter actually decided in that case was whether the School Board was to be excluded from the class of hypothetical tenants. Mr. Babington has well shown us that what was decided in *The London County Council* v. *Erith* (3), and the other cases heard with it, was whether the owner was to be considered as within the class of hypothetical tenants. As regards amount, it is stated in each of the three cases, that if the body in question was held to be a hypothetical tenant, the facts would support the valuation. *The Mersey Docks Case* (4) decided no more than that, when the ordinary mode of comparison is impracticable, the cost of construction may be resorted to; but here it has not been shown to be *wholly* impracticable. It has been shown to be practicable to ascertain the rent of the premises for at least two-thirds of the year, and we hold that the evidence that shows that is not to be put out of consideration.

We hold that much more minute consideration must be given to each case of the valuation of a country mansion than to apply to it a rule which appears to me to be nothing more or less than a rule of thumb. I could quite understand that it would be an accurate rule to ascertain the cost of construction, and to allow upon that cost of construction interest at such a rate as, in a commercial sense, would be the proper interest that would be applicable to an advance of that sum of money for the purpose of building. I can quite understand, too, that the locality should be taken into consideration in ascertaining the rate of interest. A greater rate of interest might be allowed if there were an expenditure of a sum of money in the city of Dublin than in the county Meath. But who is to determine that

(1) 55 L. J., M. C. 33.
(2) 17 Q. B. D. 738.
(3) [1893] A. C. 562.
(4) [1901] A. C. 175.

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rate of interest? There it is that the rule of thumb comes in, and the vice of this mode of valuation is that there is nothing certain in the ascertainment of the rate. You may have some facts, but you ascertain the rate of interest in a manner which is absolutely uncertain, without any opportunity of checking the rate. I am satisfied that when Sir John Barton saw that if he allowed 4 per cent. upon this money, which probably would not be a large percentage to be allowed upon money expended on building, a result would be produced that everybody would be amazed at. Everybody who knew the country would say that there must have been some error if the rent had been put down at £880 a year, and, therefore, Sir John Barton had to qualify some of the figures that produced that result, and the only figure that he could qualify was the rate of interest. Therefore, he arrived at his valuation, not by rate of interest; but he arrived at the rate of interest by what would otherwise be a reasonable valuation.

Sir John Barton has only been following out the steps adopted by his predecessors, and the rules laid down by them, but we are of opinion that that practice is not in accordance with the Act of Parliament, and, therefore, we must send this case back to the learned County Court Judge to reconsider it; but we think that, having regard to the course of the Valuation Office, and the practice prevailing for such a length of time, and the contentions of the present appellant being in several respects erroneous, each party ought to abide his own costs.

ANDREWS and JOHNSON, JJ., concurred.

Solicitors for the appellants: *Whitney & Moore.*

Solicitor for the Commissioner of Valuation: *William M. Lane.*

J. L.

THE KING (AT THE RELATION OF ALEXANDER ROBERTSON) *v.* JAMES F. O'DONNELL, DANIEL COLL, PATRICK M'GINLEY, JOHN T. SWEENEY, HUGH CAMPBELL, AND SAMUEL HANLON (1).

K. B. Div. 1906. Dec. 7.

Fisheries—Electoral Division—Conservators—Meeting—Chairman—Proxies—Fisheries (Ireland) Act, 1848 (11 & 12 *Vict. c.* 92), *ss.* 3, 11, 12.

The chairman of a meeting, called under the Fisheries (Ireland) Act, 1848 (11 & 12 Vict. c. 92), ss. 11, 12, for the purpose of electing the appointed number of persons as conservators for an electoral division, must be selected from amongst the electors present who have paid their license duty for the current year.

Two electoral divisions cannot form a consolidated constituency. The voting for conservators for each electoral division must be confined to the votes representing that division.

MOTION to make absolute, notwithstanding cause shown, a conditional order for an information in the nature of a *quo warranto* directed to James F. O'Donnell, Daniel Coll, Patrick M'Ginley, John T. Sweeney, Hugh Campbell, and Samuel Hanlon, to show by what authority they severally claimed to be and to act as conservators of fisheries for the tidal electoral division "A," and upper or freshwater electoral division "C," within the district of Letterkenny.

The several electoral divisions within said district were four in number, viz.: the tidal electoral division "B," the upper or freshwater electoral division "D," the tidal electoral division "A," and the upper or freshwater electoral division "C." By the 11 & 12 Vict. c. 92, s. 14, as amended by the 13 & 14 Vict. c. 88, s. 13, it was provided that the conservators should give notice of the times and places of the meetings for the election of conservators at which all persons who should have paid the license duty, as therein provided, in each electoral division of each district should assemble, and all persons who should have

(1) Before LORD O'BRIEN, L.C.J., and ANDREWS and JOHNSON, JJ.

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paid any such license duty for such year, within such electoral division, should be entitled to vote at such respective meetings, and should choose a chairman to preside thereat. By the 11 & 12 Vict. c. 92, s. 28, it was provided that the year for which such license should exist, and a name, number, or letter describing the district and the electoral divisions for the purposes of that Act, in which the license should be used, and the name of the engine, net, instrument, or device, for which the same should be issued, should be printed thereon in clear and legible characters, and such license should be only good and valid for the year, district, and purpose for which the same should be issued, and for no other, and that any party using or presenting the same for any other year, district, or purpose, or in any manner altering or fraudulently counterfeiting the same, should be liable to a penalty therein provided.

The times and places at which the respective meetings were to be held, within the several electoral divisions, were: for the tidal electoral division "B," and the upper or freshwater electoral division "D," at the Courthouse, Letterkenny, on the 2nd October, 1906, from 1 to 3 o'clock, and for the tidal electoral division "A," and the upper or freshwater electoral division "C," at the Courthouse, Falcarragh, on the 3rd of October, 1906, from 1 to 3 o'clock. At the time and place for the election of conservators for the tidal electoral division "A," and upper or freshwater electoral division "C," to wit, at the Courthouse, Falcarragh, on Wednesday, the 3rd day of October, 1906, the notice of the election having been duly read, John Byrne, a duly qualified voter, proposed John Sweeney, of Burtonfort, as chairman of the meeting. Mr. Sweeney had not paid any license duty for such year, within either of the electoral divisions. He was then informed that he had no *locus standi*, and could not act as chairman, as he was not one of these persons assembled who had paid license duty for the current year. He, however, persisted in acting as chairman, and proceeded to receive the votes of the persons assembled, and declared the persons who had received the greater number of votes to be elected conservators, and certified, under his hand, the election of such conservators, and furnished them with the necessary certificates.

At the meeting, John Byrne proposed, as conservators for the triennial period, three persons from the tidal electoral division "A," viz.: James F. O'Donnell, of Burtonfort, Patrick M'Ginley, of Falcarragh, and Daniel Coll, of Magheraclogher, and also proposed, at the same meeting, and at the same time and place, as conservators for the upper or freshwater electoral division "C," the following persons, viz.: John T. Sweeney, of Falcarragh, Hugh Campbell, of Burtonfort, and Samuel Hanlon, of Dungloe. An objection was made to his then proposing, as conservators, any person for the upper or freshwater electoral division "C," inasmuch as a separate meeting of those who had paid license duty within electoral division "C" was not then being held, that such meeting, as a separate meeting, would have to be held, and a chairman chosen to preside at such meeting, but John Sweeney, acting as such chairman, overruled the objection, and proceeded to receive the votes for both elections. At the same time John Byrne handed in his own license for both divisions, together with a bundle of some sixty-five proxies, all of which were appointed by holders of licenses in the tidal electoral division "A," amounting to an aggregate of 226 votes.

At the same meeting, a duly qualified elector (Mr. Edwards) for the upper or freshwater division proposed E. C. Herdman, of Carrecklee, Alexander Robertson (the relator), and Samuel Hanlon, of Dungloe, as conservators for the upper or freshwater electoral division "C," all of whom were qualified to act, and produced his own license, and handed in some sixty-five proxies, of which number John Sweeney ruled thirty-one to be illegal, inasmuch as the appointor had not cancelled the stamp by writing his name on or across the stamp, together with the true date of his so writing, though it was pointed out to him that, under the Stamp Act, the stamps were sufficiently cancelled if otherwise rendered incapable of being used for any other instrument or purpose, and the appointor had, in each case, written his name across the stamp, and thus rendered it incapable of being used for any other instrument or purpose. John Sweeney, at the close of the meeting, proceeded to count the votes, and declared and certified as chairman, that James F. O'Donnell, Daniel Coll, and Patrick M'Ginley were duly elected conservators for the tidal

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electoral division "A," and then declared the result of the election for the upper or freshwater electoral division "C." In doing so, he allowed the votes given for the candidates for the tidal electoral division "A" to be counted against the votes given for the candidates for the upper or freshwater electoral division "C," with the result that John T. Sweeney, Hugh Campbell, and Samuel Hanlon had 226 votes, and E. C. Herdman, Alexander Robertson, and Samuel Hanlon, thirty votes.

The prosecutor impugned the election on the grounds—(1) that John Sweeney, of Burtonfort, not having paid any license duty for the current year, within either the tidal electoral division "A," or freshwater electoral division "C," was not duly qualified to act as chairman of the meeting, and that he was not duly qualified to receive or count the votes at such election, or to declare or certify the election of conservators; (2) that the election was irregular by reason of the meeting of the electors of the tidal electoral division "A" being held along with the meeting of the upper or freshwater division "C," and by reason of John Sweeney, as such chairman, receiving votes given under licenses in the electoral division "A" and *vice versa*; (3) that John Sweeney wrongfully and illegally received and counted as votes certain proxies of votes for the freshwater electoral division "C" in favour of the candidates for tidal electoral division "A," and *vice versa*; (4) that John Sweeney illegally and without authority ruled thirty-one proxies handed in by duly qualified voters, in favour of E. C. Herdman, Samuel Hanlon, and Alexander Robertson, to act as conservators for the upper or freshwater division "C," to be refused by reason of the persons signing same not having written their name across the stamps thereon; (5) that John Sweeney wrongly and illegally received and counted as votes certain proxies of votes for the tidal division "A" in favour of candidates for the freshwater division "C."

John Sweeney, by way of cause, showed that he was one of the conservators elected for the previous triennial period, and that when John Byrne proposed, and John Early seconded, that he should take the chair, there was no counter-proposition, and no objection was taken by any person entitled to vote. John Byrne handed in 112 sea-license proxies, and one inland license, and Edwards handed in sixty-four proxies. With the exception of

three votes, all the voting was by proxy. John Sweeney did not vote at the election. No objection whatever was made by any person present entitled to vote to the course adopted at any time throughout the election. On the contrary, those who handed in the votes for the upper or freshwater electoral division "C" handed in their proxies by Edwards to Sweeney as chairman, without a protest of any kind.

Henry, K.C., *Connor*, K.C., and *H. Morgan Byrne*, for the relator.

Law Smith, K.C., and *Wood*, for the defendants.

LORD O'BRIEN, L.C.J.:—

There is one very important question in this case, viz., whether at an election of conservators the chairman must be selected from those who are licensed to fish and are present. It is admitted that Mr. Sweeney, who was selected to act as chairman of the meeting in question, was not licensed for the year 1906. The words of the section of the Act of Parliament (11 & 12 Vict. c. 92, sect. 11) are as follows:—"And be it enacted that the said Commissioners shall appoint the places and times at which all persons who shall have paid the license duty as herein provided in each electoral division of each district for the year one thousand eight hundred and forty-nine, shall assemble in the month of July in that year, the Commissioners giving two weeks' notice thereof by handbills and advertisements in two or more newspapers circulating in such district; and all persons who shall have paid any such license duty for such year within such electoral division shall be entitled to vote at such respective meeting, and shall choose a chairman to preside thereat."

Is it lawful, having regard to these words, to appoint a person as chairman who is not licensed? Would it be lawful for them to select any unlicensed person who happened to be present at the meeting to act as chairman? I think not. We all think not. In my opinion, the question is mainly determined by the use of the word "choose." "Shall choose a chairman"—that is, shall choose out of the licensed persons who are there—the persons who have paid the license duty.

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The character of the meeting and the use of the word "choose" establish that the chairman must be one selected from amongst those who are at the meeting; and the section contemplates clearly that no one is to be at the meeting but those who have paid their license duty. That appears also from the proviso at the end:—"Provided always, that it shall be lawful for the said Commissioners, or any one or more of them, to *attend* and preside at any such first meeting, instead of such chairman." I think the proviso shows that there is to be no one present but those who have licenses. The special provision made for the attendance of Commissioners, who need not be licensed, shows that the general position is that all others should be licensed.

Then there is section 12. The important matter is to ascertain the meaning of section 11, because we think "chairman as aforesaid" in section 12 means chairman chosen as aforesaid.

This is the first point in the case. It is a point of considerable importance; but neither I nor my brothers have any doubt that the true view is what I have stated—that they cannot roam around the whole empire to select a chairman. This view makes the election invalid.

As regards the freshwater electoral division "C," the points sought to be made in support of the election were given up. It is plain that there cannot be, so to speak, a consolidated constituency. Having regard to the 3rd, 11th, and 12th sections of the Act of Parliament, and especially the 11th, it is plain that the people who are to vote are to vote for one division only. Mr. Smith candidly concedes that. He does not defend the election as regards C; and as regards A, that is disposed of by the decision with reference to the chairman.

I do not think it is necessary to go further into the case. As regards costs, we are of opinion that there was no want of *bona fides* on the part of Mr. Sweeney; that the course was pursued for several years before; and that each party should abide their own costs.

ANDREWS and JOHNSON, JJ., concurred.

Solicitor for the relator: *James Boyle.*
Solicitor for the defendants: *John Mallins.*

J. L.

M'CARNEY *v.* BEATTY (1).

K. B. Div. 1907. Jan. 16.

Practice—Remitting—Notice of motion erroneously framed under 5th (contract) section—Amendment.

Where a notice of motion to remit an action for breach of promise of marriage was framed under the 5th (contract) section :—

Held, that the Court could amend the notice so as to frame it under the 6th (tort) section.

Crooks v. *Gibson* (2) followed.

MOTION to remit an action for breach of promise of marriage to the County Court. The notice was framed under the 5th (contract) section of the Common Law Procedure Act, 1870, and omitted the proviso "unless the plaintiff shall give full security for the defendant's costs."

Muldoon, for the plaintiff, made a preliminary objection that the notice of motion was wrongly framed.

Gaussen, for the defendant, cited *Crooks* v. *Gibson* (2).

THE COURT gave liberty to amend. The order made was :—

"IT is ordered that the notice of this motion be amended by framing same under the 6th sect. of the Common Law Procedure Act, 1870."

Solicitor for plaintiff: *W. D. Graham.*
Solicitor for defendant: *T. J. Mayne.*

R. G. L. L.

(1) Before ANDREWS, BOYD, and WRIGHT, JJ.
(2) Unreported. April 16, 1896. Before Johnson, Holmes, and Gibson, JJ.

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L'AMIE *v.* WILSON (1).

Practice—Inspection of bank account—Bankers' Books Evidence Act, 1879, *ss.* 6, 7 (2).

An application for inspection of the bank account of a person not a party to the action ought not, as a general rule, to be granted without notice to such person and to his bankers, and then only upon an affidavit showing, to the full satisfaction of the Court or Judge, that there are good grounds for believing that there are entries in the account material to some issue to be tried in the action, and which would be evidence at the trial for the party applying for such inspection.

Motion on behalf of the Hibernian Bank, Limited, to discharge an order made by Johnson, J., on 21st December, 1906, upon the *ex parte* application of the plaintiff, in the following terms:—"It is ordered that the Hibernian Bank, Limited, College Green, Dublin, do give inspection to the plaintiff, his agent or solicitor, or any of them, of the account of Thomas Geoghegan, Sons, and Company, with them, from the 1st January, 1902, to the 1st August, 1906, inclusive." This order was granted upon two affidavits sworn by the plaintiff. One of them was in the following terms:—"I am plaintiff in above action for recovery of a sum of money due on foot of three promissory notes. The defendant has raised the defence of fraud, want of consideration, and forgery, and it will be necessary for me to have a copy of the account in the Hibernian and National Banks from the 1st January, 1902, to the 1st August, 1906, of Thomas

(1) Before Andrews, Boyd, and Wright, JJ.

(2) 42 Vict. c. 11, s. 7:—"On the application of any party to a legal proceeding, a Court or Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed, unless the Court or Judge otherwise directs."

Geoghegan, Sons, and Company, in order to enable me to trace the transactions of Thomas Geoghegan, Sons, and Company, and the moneys paid to them, and by them, and their dealings with bills of exchange and promissory notes made by Wilson to Thomas Geoghegan, Sons, & Co., or Harold C. Geoghegan, or either of them." The other affidavit was in the following terms:—"I am aware that Harold Charles Geoghegan, whose name is endorsed on the promissory notes, the subject of this action, carried on business under the name and style of Thomas Geoghegan, Sons, & Co., and had a banking account under that name at the Hibernian Bank, Limited, College Green, Dublin. I am also aware that the said Harold Charles Geoghegan kept a banking account at the National Bank, Limited, College Green, Dublin, in his own name."

The said Harold C. Geoghegan was only one of the partners in the firm of Thomas Geoghegan, Sons, & Co., and the bank account was the firm's account.

W. G. Gibson, for the Bank:—

The jurisdiction to make an order for inspection of the banking account of a person not a party to the action is doubtful: *Pollock* v. *Garle* (1).

If it can be made, it should be made only upon notice to the person of whose account inspection is sought and also to his bankers: *S. Stafford Tramways Co.* v. *Ebbsmith* (2). It does not here appear that the account of which inspection is sought is in reality or in substance the account of the defendants, or that it contains any entry which would be evidence upon the matters at issue against the defendants. This order permits a roving inspection of the banking account of Thomas Geoghegan, Sons, & Co., regardless of its relevancy to the matters at issue or of the interests of persons who are not concerned in the action.

A. A. Dickie, for the plaintiff in support of the order:—

The entries in the account are shown to be material evidence on the issues against defendant. Notice is unnecessary: *Howard*

(1) [1898] 1 Ch. 1. (2) [1895] 2 Q. B. 669, 675, 677.

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v. *Beale* (1); *Fitz Patrick* v. *M'Donald* (2); *M'Gowan* v. *Kiernan* (3).

ANDREWS, J.:—

This is a case of very considerable importance, and I shall state our reasons for discharging this order. The 7th section of the Bankers' Books Evidence Act, 1879, has been judicially construed so as to limit the generality of the words if taken literally, and it has been repeatedly laid down that the jurisdiction conferred by that section ought to be exercised with great caution: *South Staffordshire Tramways Co.* v. *Ebbsmith* (4).

Such caution is requisite, even when the inspection applied for is of the account of a party to the action; but when the account is that of a third party, still greater caution is necessary; and before granting an inspection of a third party's account, the Court, or Judge, ought to be satisfied that there are good grounds for believing that there are entries in the account material to some issue to be tried in the action, and which would be evidence at the trial for the party applying for the inspection.

We think the affidavits in this case are insufficient, and that an order for the inspection asked for ought not to be made upon them. No sufficient grounds are deposed to for enabling the Court to believe, with any confidence, that there probably are such entries in it; and the second affidavit, if not untrue, is at least misleading, as it appears that Harold C. Geoghegan was only a partner in the firm of Thomas Geoghegan, Sons, and Company, and that there was another partner in that firm, and that the bank account was the firm's account.

The 7th section, no doubt, gives the Court, or Judge, a discretion to make an order for inspection of a bank account, either with or without notice to the Bank or any other party, but we are of opinion that, unless in very exceptional cases, notice of an application to inspect the bank account of a third party ought to be given, both to such third party and to the Bank. Kay, L.J., was strongly of this opinion, as regards notice to the

(1) 23 Q. B. D. 1.
(2) 30 L. R. Ir. 249.
(3) 35 I. L. T. R. 84.
(4) [1895] 2 Q. B. 669.

third party: *South Staffordshire Tramways Co.* v. *Ebbsmith* (1). As regards the generality of the words of the 7th section, Lindley, M.R., in *Pollock* v. *Garle* (2), considered that it would be monstrous to suppose that it was the intention of the Legislature that the Court might enable any party to legal proceedings to inspect and take copies of any entries in the banking accounts of any other people, with which we entirely agree.

We also wish to express our complete agreement with the opinions of Lord Esher, M.R., and Kay, L.J., given in their judgments in *South Staffordshire Tramways Co.* v. *Ebbsmith* (3), as to what the Court or Judge should be satisfied of before making an order for the inspection of the bank account of a third party.

We do not think that any grounds have been shown, and we doubt whether any grounds could be shown, sufficient to sustain this roving order appealed against, and it must, therefore, be discharged with costs.

We, of course, say nothing respecting what might take place at the trial, if the action were to go to trial, or as to any order which the presiding Judge might have power to make at the trial, with reference to the bank account in question, or any evidence therein, having regard to what might be disclosed at the trial in reference thereto.

BOYD and WRIGHT, JJ., concurred.

Solicitors for the Hibernian Bank: *D. & T. Fitzgerald.*
Solicitor for the plaintiff: *W. A. MacMullan.*

R. G. L. L.

(1) [1895] 2 Q. B. at p. 677. (2) [1898] 1 Ch. at pp. 4, 5.
(3) [1895] 2 Q. B. at pp. 674, 675, and 677, 678.

K. B. Div. 1906. Feb. 9, 12, 21. *Appeal.* May 1.

WILLIAM BUTTERLY *v.* MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF DROGHEDA (1).

Negligence—Contributory negligence—Finding that the defendants could, by ordinary care, have avoided the consequence of the plaintiff's negligence—Proper questions to be left to the jury.

In an action for damages for personal injuries, in which the negligence complained of was the placing of a heap of stones on the highway, whereby the plaintiff was thrown out of his pony-trap, the jury found that the defendants had been guilty of negligence; that the plaintiff had been guilty of negligence; and that the defendants could have, by the exercise of ordinary care, avoided the consequence of the plaintiff's negligence:—

Held, that the finding was one of contributory negligence, and that the verdict should have been entered for the defendants.

The questions to be left to the jury in cases of contributory negligence discussed.

ACTION for personal injuries, caused by the defendants having wilfully, wrongfully, and negligently, placed and suffered to remain on a public highway, known as Scarlet Street, in the town of Drogheda, several heaps of gravel, stones, and road material, so as to obstruct the highway, whereon the plaintiff was lawfully driving with his horse and trap. The evidence was that on the 17th December, 1904, the plaintiff, William Butterly, who was an extensive farmer at Seafield, in the county of Louth, was driving to Drogheda in a trap, accompanied by his wife and daughter. It being Christmas market-day, there was considerable traffic on the roads leading to Drogheda, and when they reached Scarlet Street, Drogheda, there was a Mrs. Morgan driving in a trap close behind. The plaintiff, who was driving his trap, drew to the left to let Mrs. Morgan pass. He drove into a heap of stones, which upset the trap, and all its occupants were thrown on the road. The heap of stones was placed on the road by the

(1) In the King's Bench Division, before LORD O'BRIEN, L.C.J., and BOYD and WRIGHT, JJ.

Corporation officials in the course of metalling operations going on in Scarlet Street. The workmen had brought a load of stones, and tilted-out half at the point where the accident occurred, to be spread out as soon as they could attend to it. They tilted out the other half at a point about 30 yards further on in the town, and were actually engaged in spreading it when the accident occurred. The heap that caused the accident was at a distance of 12 feet from the right-hand side of the road, and 6 feet from the left-hand side, there being space for two cars to pass on the right-hand side of the heap, and for one car on the left-hand side of the heap. It was admitted that the object of selecting the market-day for metalling that street was that the farm-carts coming in to market might wear the stones down. The plaintiff suffered severe injuries, especially in the region of the spine. In cross-examination he admitted that he paid a Miss Hart 18*s.* compensation for a pane of glass broken on the same day by his cart. It was the act of his servant.

Mrs. Morgan was not examined at the trial.

Johnson, J., who tried the case, left the following questions to the jury:—

1. Were the defendants, by their workmen, guilty of negligence? *Answer*—Yes.

2. Was the plaintiff guilty of negligence? *Answer*—Yes.

and if so—

3. Could the defendants, by the exercise of ordinary care, have avoided the consequence of the plaintiff's negligence? *Answer*—Yes.

4. What damages; if plaintiff entitled to recover damages? *Answer*—£75.

The Judge gave judgment for the plaintiff for £75 damages.

The defendants applied to have the judgment set aside, on the grounds that there was no evidence reasonably capable of sustaining the finding of negligence against the defendants, and that the learned Judge ought to have so directed the jury; and that the first and third findings were against the evidence, and the weight of evidence, and were perverse; and on the further ground that fresh evidence, viz., a statement made by Mrs. Morgan, the driver of the second trap, had been discovered, which

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could not with reasonable diligence have been discovered before the trial.

Healy, K.C., and *Chambers*, K.C. (with them *M'Cann*), for the defendants:—

Upon the findings of the jury, judgment should have been entered for the defendants. So far as the defendants are concerned, only one act of negligence is alleged, viz. the placing of the heap of stones upon the road. This act was relied upon by the jury when they found negligence in reply to the first question; but when this act of negligence is used to support the answer to the first question, there is no evidence of any other act of negligence, and therefore no evidence to support the finding in answer to the third question, that the defendants could, by the exercise of ordinary care, have avoided the consequence of the plaintiff's negligence. Therefore, the finding on the third question must fall to the ground, and the case must be dealt with according to the ordinary rule, that when there is a finding of negligence against the defendant, and a finding of contributory negligence against the plaintiff, the result is a verdict for the defendant.

Serjeant Dodd and *The Right Hon. J. H. Campbell*, K.C. (with them *Cusack*), for the plaintiff:—

The meaning of the third finding is, that the real cause of the injury was an act of negligence of the defendants. The defendants were guilty of two classes of negligence—1st, in placing the stones on the road at a time when, and in a position where, they would be dangerous to traffic; and, 2nd, in not providing some protection or giving some warning. Even if the plaintiff was negligent in bringing his car into a position of danger, the obligation to protect, or to warn, continued down to the very moment the accident happened. The omission to discharge the latter obligation is evidence to support the third finding.

[The following cases were referred to:—*Doyle* v. *Kinahan* (1);

(1) Ir. R. 4 C. L. 150.

Wakelin v. *London & South-Western Railway Co.* (1); *Slattery* v. *D. W. & W. Railway Co.* (2); *Clements* v. *County Council of Tyrone* (3); *Curtin* v. *Great Southern & Western Railway Co.* (4); *The Bernina* (5).]

Cur. adv. vult.

Feb. 21.

LORD O'BRIEN, L.C.J.:—

The facts which give rise to the controversy we have to determine, in this case, are comprised within a narrow compass. The plaintiff, on a Saturday morning, was coming into the town of Drogheda in a car driven by himself. Coming near the town he, as he alleged, was overtaken by the horse and car of Mrs. Morgan. She desired to pass. He says he made way for her, and, in doing so, ran against a heap of stones on the road, and his car was upset and he was injured. It appears that there were two heaps of stones on the road. They had been, immediately before the collision, thrown on the road in order that they might be spread on the road. The man who brought the load, and had thrown them on the road, was a servant of the defendants. The intention was to spread them immediately on the road. The man who brought them was in fact, at the time of the accident, engaged in spreading the heap next the town, some little distance from the heap where the accident occurred. Now the first heap, where the accident occurred, was placed on the road in such a position that there was between it and the right side of the road a space of 12 feet, and between this heap and the left side of the road, 6 feet. That is to say, on the right side there was a space sufficient for two cars to pass simultaneously, and on the left a space for one car to pass. The plaintiff's case was that, Mrs. Morgan overtaking him, he made room for her, pulled to the left, and without any default of his, his car ran upon the heap and was capsized. His case was that Mrs. Morgan caught him exactly where the heap was, and, in endeavouring to avoid her, and without any default or negligence on his

(1) 12 A. C. 41.
(2) 3 A. C. 1155.
(3) [1905] 2 I. R. 415.
(4) 22 L. R. Ir. 219.
(5) 12 P. D. 58.

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part, the accident occurred. Now, three questions were left to the jury:—

1. Were the defendants, by their workmen, guilty of negligence? Yes.

2. Was the plaintiff guilty of negligence? Yes.

And if so—

3. Could the defendants, by the exercise of ordinary care, have avoided the consequence of the plaintiff's negligence? Yes.

I have invariably refused, in these negligence cases, to leave questions in this form to a jury. This formula appears to me calculated to perplex and embarrass a jury. No doubt this formula is used, and judges do their best to explain it, but I fear that when juries take up the questions in the jury-room, the explanation has not the desired effect. Chief Justice Monahan consistently refused to put the questions in this shape to the jury. I have always tried these cases on two questions—1st, Were the defendants guilty of negligence? and, 2ndly, if so, was the defendant's negligence the real, direct, and immediate cause of the misfortune? Now, the jury in the present case answered the questions submitted to them in the way I have read. I am of opinion that the answer to the question finding that the plaintiff was guilty of negligence, determines the matter in favour of the defendants. It is quite plain, in my opinion, that his negligence was a direct contributory cause of the accident. It was a cause which brought him on the heap of stones. Assuming that there was negligence on the part of the defendants in having the stones there, still his negligence must have contributed to his running up against them. He either did not keep a sufficient look-out, or his unskilful driving brought him on the stones. Getting on the stones, through negligence, was at least a contributory cause of the accident. It directly contributed to the accident. If there be two causes directly contributing to the accident, one the negligence of the defendant and the other the negligence of the plaintiff, the result is a verdict for the defendant. The latest case on the subject is *Reynolds* v. *Tilling* (1), in which the ruling of Walton, J., was confirmed in the Court of Appeal (Lord

(1) 19 T. L. R. 539.

Lindley, Romer and Matthew, L.JJ.), counsel for the defendant not being called upon. It is a very important case, and every line of it should be read. It was an action for damages for personal injuries. The facts and findings of the jury are fully stated in the judgment. The plaintiff's counsel contended that the findings of the jury were inconclusive, and the defendants' counsel contended that they amounted to a verdict in his favour, and entitled him to judgment. Walton, J., took time to consider his judgment, and we have the benefit of a verbatim report of it, if indeed it was not actually a written judgment, which it appears to be. He says: "The accident happened in the High Street, Deptford. The plaintiff and a boy were pushing a truck along the High Street. As they were proceeding along their left-hand side of the street, they came to a van which was drawn up also on the left-hand side of the street, close to the kerb, outside a greengrocer's shop. After passing just clear of the van, they pushed the truck in again towards the left-hand side of the street, and were proceeding on their way along the High Street. Just at this moment, the defendants' omnibus, which was being driven along the High Street following the truck, overtook it almost immediately after it passed the van, and the near hind-wheel of the omnibus struck the off-wheel of the truck, throwing the truck round on to the kerb, and injuring the plaintiff. As to these facts there was no dispute; and, it is important to note, especially that it was admitted on both sides, that it was the hind-wheel of the omnibus that came into contact with the wheel of the truck. In these circumstances, the case for the plaintiff was, that the driver of the omnibus was not keeping a proper look-out, and in consequence collided with the truck. The driver of the omnibus admitted that he did not see the truck until he was just passing clear of the van. The case for the defendants was, that after the truck had passed round, and got behind the van, it was negligently pushed out into the roadway, right across the course of the omnibus, and so as to catch the hind-wheel of the omnibus with the off-wheel of the truck—or, in other words, that the truck was negligently pushed against the omnibus. In answer to questions put by me to the jury, they found that there was negligence on the part of the driver of the omnibus, and they

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also found that there was negligence on the part of the plaintiff, which contributed to the accident. At the request of the plaintiff's counsel, I put a further question to the jury: 'Whether, notwithstanding the negligence of the plaintiff, the driver of the omnibus could, after the truck was pushed towards the middle of the road, and so across the course of the omnibus, have avoided the accident by the use of reasonable care?' And, I added a further question: 'Whether the driver of the omnibus, and the plaintiff, could, each of them, up to the moment of the collision, have prevented the accident by the use of reasonable care?'" So that the learned Judge had this embarrassing formula before his mind. He proceeds: "Upon these two questions the jury were unable to agree. Thereupon, the counsel for the defendants asked me to enter judgment for the defendants upon the facts actually found by the jury, and notwithstanding their disagreement on the third and fourth questions put to them. On the other hand, it was contended, on behalf of the plaintiff, that the verdict was inconclusive, and that the case must be tried again. It is plain that, upon the findings as they stand, judgment cannot be entered for the plaintiff. The jury have found that the plaintiff was guilty of contributory negligence, and they have been unable to agree as to whether or not the driver of the omnibus could, notwithstanding the negligence of the plaintiff, have prevented the accident by the exercise of reasonable care. In considering whether, under these circumstances, judgment ought to be entered for the defendants, I think I must deal with the case as if the third question had been answered in favour of the plaintiff. If, even upon this assumption, it is plain upon the findings, that the accident was caused directly and proximately not only by the negligence of the driver of the omnibus, but also by the contributory negligence of the plaintiff, then I think that judgment should be entered for the defendants. In other words, if the accident was directly and proximately caused by the truck being negligently pushed into the omnibus, then I think that, even though the driver of the omnibus might, by the use of reasonable skill and care, have avoided the accident, still the plaintiff would not be entitled to succeed."

These are the words of Walton, J., and, in my judgment, in the case we are now dealing with, it is perfectly plain that the plaintiff's negligence was directly and proximately a contributory cause of the accident. Personally I think it was the sole immediate cause of the accident, but certainly it was a cause directly contributing to the accident. Therefore, I hold that the verdict here must be entered for the defendants.

Now, this case of *Reynolds* v. *Tilling* went to the Court of Appeal (1), where it was heard by a very distinguished tribunal, and without calling upon counsel for the defendants the judgment of Walton, J., was affirmed. This most important authority, in my opinion, concludes this case. Another case with which we used to be very familiar in our younger days is *Doyle* v. *Kinahan* (2). There there was a disagreement between Fitzgerald, B., and Deasy, B., on the one side, and Pigot, B., upon the other, the majority of the Court laying down the rule thus:—"That which alone can entitle the plaintiff to recover is that the defendant's default was the *entire* cause of the injury." Here no one can say that the defendants' default was the entire cause. In *Wakelin's Case* (3) there are some passages in the judgment of Lord Halsbury and Lord Watson which have an important bearing upon the question here. Lord Halsbury, speaking of one of the parties, says—"She may indeed establish that the event has occurred through the joint negligence of both (her husband and the defendants), but if that is the state of the evidence the plaintiff fails, because '*in pari delicto potior est conditio defendentis.*'" Lord Watson says in the same case—"It appears to me that in all such cases the liability of the defendant must rest upon these facts—in the first place, that there was some negligent act or omission on the part of the Company or their servants which materially contributed to the injury or death complained of, *and, in the second place, that there was no contributory negligence on the part of the injured or deceased person.*" Here contributory negligence was found by the jury, and, applying the doctrine laid down by Lord Watson, the plaintiff cannot succeed. There is one passage in Lord Hatherley's judgment in *Slattery's Case* (4) to which I will refer. After expressing

(1) 20 T. L. R. 57. (2) I. R. 4 C. L. 150. (3) 12 A. C. 41. (4) 3 A. C. 1155.

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concurrence with a passage in the Lord Justice Barry's judgment, he proceeds—"But I concur also in the opinion expressed by Chief Baron Palles that 'when there is proved as part of the plaintiff's case, or proved in the defendant's case, and admitted by the plaintiff, an act of the plaintiff which *per se* amounts to negligence, and when it appears that such act caused or directly contributed to the injury, the defendant is entitled to have the case withdrawn from the jury.'" That case is very much in point upon the findings here. The finding of the jury that the plaintiff was guilty of negligence plainly involved that his negligence was a direct contributory cause of the accident. I asked Serjeant Dodd what was the precise meaning of the finding—what was the negligence the jury found the plaintiff guilty of? His answer was that he did not know. Subsequently, when the argument was energetically addressed to this consideration, the learned Serjeant suggested that, as at some other time or some other place it was suggested that the plaintiff drove into a window, the jury might have referred to this—that the plaintiff was cross-examined as to this, and that the jury might in some way have referred to it. This is wholly untenable. Indeed, it would involve a reflection upon the Judge as well as upon the jury, though I am perfectly certain that the learned Serjeant did not intend anything of the kind. No Judge could possibly so express himself as to lead a jury to suppose they could find a verdict of negligence on such grounds.

Now, turning from these cases, I am of opinion that, irrespective of the findings of the jury, there was no evidence of negligence on the part of the Corporation. The Corporation was bound to take reasonable measures for the repair of the road, and the plaintiff was bound to take reasonable care not to get into a difficulty. In *Butterfield* v. *Forrester* (1) Lord Ellenborough said:—"Two things must concur to support this action—an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff." This case is referred to in Pratt's Law of Highways, p. 94. In this case what did the Corporation do? They placed on the road, to be immediately spread, two heaps of stones. The one in question was 4 feet square and about

(1) 11 East, 60.

1½ feet high. It was only half a load, as my brother Boyd pointed out; so large, however, that it was quite visible, and could be seen easily by anyone that chose to keep a look-out. There was no latent danger. These heaps were put there in broad daylight. What negligence was there in doing that? It was the well-known ordinary method adopted for metalling the road. Under the circumstances, there was no obligation, in my opinion, on the part of the Corporation to have, in broad daylight, any protection around the heap that was to be immediately spread. Why? If there was to be a protection put round heaps of this character that were to be immediately spread, the task of spreading would take at least four times as long as it otherwise would, and it would be attended with great expense. The erection and the removal of the protection would cause great delay and great expense. In fact, the protection should be put up to be immediately pulled down; and why all this? To dispense a wayfarer from the obligation of using his eyes. Serjeant Dodd said that there should be a man with a flag. That is a very far-fetched proposition—that there should be a man with a flag to warn people at ten o'clock in the morning not to run up against these heaps of stones, which could be easily seen. The size of the heap made it visible at a considerable distance. It was argued that the heap was too large; but, in my opinion, the fact that the size of the heap made it plainly visible, and that it was broad daylight when the accident occurred, destroy the plaintiff's case. And it should not be lost sight of that there was, in fact, 6 feet to pass on the left-hand side—the plaintiff's proper side—and 12 feet on the right-hand side of the heap. Whatever the size of the heap, there was abundant room to pass, at the left side for one car, and at the right side for two cars. I think it is absolutely plain that the whole thing was caused by the plaintiff not taking proper care; and I do not think that this Corporation, who were bound to keep the roads in repair, did any act which was proper to be submitted to the jury as evidence of negligence. *Clements' Case* (1) was *toto cælo* different—different in the character of the obstacle—and the time of the occurrence was night time. Indeed, the judgments in that case were a waste of judicial power.

(1) [1905] 2 I. R. 415.

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But let me ask—What did the Corporation omit to do in what has been described as the "agony of the collision"? What were they to do? The plaintiff ran upon the heap of stones. That was *his* negligence. What were they to do to avoid the consequences of that? In the agony of the collision they could have done nothing. I think there is no evidence of negligence whatever on their part. There was no negligent act—there was no negligent omission. Certainly there was no evidence of actionable negligence, that is to say, of negligence *causing the injury* (see the case of *Curtin* v. *The Great Southern Railway Co.*) (1). The jury confounded what lawyers call *causa causans* with *causa sine qua non*. It is very hard to get a jury to grasp the distinction between these two things when this confusing formula is put before them. No doubt the accident would not have occurred without the heap of stones being where it was, but the immediate proximate cause of the accident was the negligence of the plaintiff in driving into the heap.

I am of opinion that there should have been a verdict directed for the defendants; but now let me say a word as to the trial. The jury attached the greatest importance to the case the plaintiff made—that it was because he was obliged to make way for the woman, Mrs. Morgan, who was coming on behind, at the very point where the stones were, that he drove into the stones. The jury came out and asked whether he was bound to make way for Mrs. Morgan, showing how this allegation put forward by the plaintiff affected their minds. But what was the actual state of things? The plaintiff's advisers had in their possession all the time a statement from this lady that she had passed the plaintiff before the time that he came upon the heap of stones. She indicated the place she passed him by reference to another road which was shown on the map. This was very different from what the plaintiff swore. In fact, it directly negatived the plaintiff's case, because his case was, that he ran upon the heap of stones in making room for her to pass. Mrs. Morgan had actually been seen by plaintiff's solicitor, and was brought into Court by the plaintiff's advisers. To all appearances she was made the plaintiff's

(1) 22 L. R. Ir. 219.

witness. Her statement, if true, is completely in opposition to the case plaintiff made, and would, if true, destroy the case he made. Certainly, if she passed the plaintiff at the place pointed out, the jury, if they believed her, would not act on the plaintiff's evidence. My own view is that Mrs. Morgan did pass the plaintiff where she says—that he was too much to the right side; that he did, to a certain extent, make room for her, but instead of pulling up, or moderating his speed, he bungled into the heap. If he had kept his own side of the road, there would have been no accident. The fact that Mrs. Morgan's evidence was kept back, as no doubt it deliberately was, renders the trial very unsatisfactory indeed; but, however this may be, I am of opinion that a verdict should be entered for the defendants, firstly, on the ground that there was no evidence of negligence; and, secondly, having regard to the finding of the jury.

BOYD, J.:—

I entirely concur; and if it were not for the importance of the case, I would add nothing to what has been said. But I think it necessary, in some small degree, to refer to the facts upon which I base my judgment.

It is unnecessary to state at any length the evidence given by the witnesses at the hearing; but I desire to draw attention to the discrepancy which appears between the evidence of the plaintiff and his wife as to the position of the plaintiff's trap when approaching the heap of stones, and the action of the plaintiff when it is alleged Mrs. Morgan's vehicle was passing him. The plaintiff says he drew to the left to let her pass, and, to use his own expression, slapped into one of the heaps. If he had been driving on his proper side of the road, he would have been on the left-hand side, and if he pulled, as he says, to the left to allow her to pass him, her trap would have been between him and the heap, and his right wheel could not possibly have got on the stones. Mrs. Butterly says that her husband pulled out into the middle of the street to let Mrs. Morgan pass, and that she passed to the left by Butterly, which was the wrong side to pass a vehicle going in the same direction. It is alleged that some fence should have been placed around this temporary heap of stones on the road. With

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regard to this I endorse all that has been said by the Lord Chief Justice. It was a temporary heap, placed there in the ordinary course of metalling the road. A load was brought up; half of it was dropped on one part of the road, and the rest of it was placed farther up. What sort of fence could they have put round a small temporary heap of stones of this description. As has been well said in one of the cases, though we are Judges, we cannot shut our eyes to the ordinary occurrences of life; and I cannot shut my eyes to the fact that I never saw a heap of road metal laid on the road to be spread as in this case, fenced or guarded in the way suggested.

I am of opinion, however, that the point for decision in this case does not depend so much upon discrepancies in the evidence as upon the law applicable to cases in which a plaintiff has been guilty of contributory negligence in the occurrences of which he complains, and in respect of which he seeks to recover damages from the defendants. Assuming that the defendants were guilty of negligence in placing the stones on the road in the manner alleged (of which I have grave doubts), could the plaintiff, by the exercise of ordinary care, have avoided the consequences of such negligence? The jury have found that the defendants were negligent, and also that the plaintiff was guilty of contributory negligence. They have also found that in the occurrences complained of, the defendants, by the exercise of ordinary care, could have avoided the consequences of the plaintiff's negligence. I do not find one particle of evidence given at the trial to sustain this last finding. In *Davies* v. *Mann* (1) and *Radley* v. *The London and North-Western Railway Co.* (2), and several other cases of a like character, the plaintiffs were the parties who were primarily negligent; and in those cases it was held that a plaintiff, in like circumstances, was not entitled to recover in case a defendant could, by the exercise of ordinary care, have avoided the consequence of the plaintiff's negligence.

In the present case, it was the defendants who were primarily negligent, and the plaintiff who is guilty of contributory negligence; and I fail to see what act or precaution the defendants

(1) 10 M. & W. 546. (2) 1 A. C. 754.

could have subsequently adopted to have avoided the consequence of the plaintiff's neglect. That, I take it, is the law, and unless the plaintiff can show and prove that the defendants could have thus avoided the effect of his negligence, he is not entitled to succeed in the action. No evidence was given to this effect. In *Wakelin* v. *The London and South-Western Railway Co.* (1), the Lord Chancellor (Lord Halsbury), at p. 45, very clearly states the law as to contributory negligence, and concludes his judgment with the following words:—"It has been argued before your Lordships that we must take the facts as found by the jury. I do not know what facts the jury are supposed to have found, nor is it, perhaps, very material to inquire, because if they have found that the defendants' negligence caused the death of the plaintiff's husband, they have found it without a fragment of evidence to justify such a finding."

Again, in the case of *Reynolds* v. *Tilling* (2), Walton, J., states the law as follows:—"I think I must deal with this case as if the third query had been answered for the plaintiff. If, even upon this assumption, it is plain upon the findings that the accident was caused directly and proximately not only by the driver of the omnibus, but also by the contributory negligence of the plaintiff, then I think judgment should be entered for the defendants"; and he refers to the decision of Lord Lindley in the case of "*The Bernina*" (3).

WRIGHT, J.:—

The jury have found that the defendants were guilty of negligence, which I read as meaning that the defendants were guilty of negligence in leaving this heap of stones on a public road or street without any fence or barrier to prevent persons from driving into it, or anyone to call attention to it, and so prevent it's being a source of danger.

I think there was evidence to support this finding. The defendants, as the road authority, had imposed upon them the duty to keep the streets of Drogheda in repair. In discharge of that duty their servants put on this street two loads of stones, one of which

(1) 12 A. C. 41. (2) 19 T. L. R. 539. (3) 12 P. D. 58.

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was properly levelled and spread out, the other was divided into two parts, one of which remained as it was tilted from the cart, a foot and a half in height, and extending 4 feet over the surface of the road.

In fact, it was only there for a very short time, probably much under half-an-hour; but, however short a time it may have been there, and however little moral blame may attach to the defendants, the fact remains that a heap of stones, large enough to do injury to anyone driving into it, was deposited by the defendants on a road or street under their control.

The jury have further found that the plaintiff was guilty of negligence; and this finding can, in my opinion, only mean that he did not keep a proper look-out, and thus drove into this heap of stones, which, if he had used his eyes, he would have seen and avoided.

If the findings rested there, the result would be, that the jury have found that, while the defendant Corporation was guilty of negligence in leaving the heap of stones on the road, the accident was caused by the plaintiff's own negligence in not keeping a proper look-out, and that if he had used due care and kept a proper look-out, he would not have run into the heap, and the accident would have been avoided.

These findings would, in my judgment, have amounted to a verdict for the defendants, for they would have meant that the direct and immediate cause of the accident was the plaintiff's own negligence. But then comes the third finding, *i.e.* that defendants could, by the exercise of ordinary care, have avoided the consequence of plaintiff's negligence. Judges differ as to the form in which they leave to juries the question, or questions, on which the plea of contributory negligence is tried. There is certainly nothing wrong or unusual in the form in which the questions were framed in this case by the learned Judge; and I am well aware that no objection was made on either side, either to the form of the questions, or to the instructions given by the learned Judge to the jury. Nevertheless, questions so framed may be, and in practice probably often are, not very intelligible: they leave room for much confusion; and a jury, however honest and intelligent, cannot always discriminate between questions as to negligence in

three forms, if not at three stages. It, therefore, becomes necessary to see is there evidence to support this third finding, and having read the whole evidence, I find nothing to sustain it. The initial negligence of the defendants was in leaving this heap of stones on the road-way, without anything in the nature of a fence or a notice, or anyone to warn passers-by. That is the head and front of their offending. There was no further act, and no other omission on their part, and it appears to me that the jury have found negligence twice over against the Corporation, grounded on this primary negligence and no more.

I think this finding cannot be sustained, and ought to be set aside, with the result that the verdict and judgment should be for the defendants.

Our attention has been called since the hearing to a reported case of *Reynolds* v. *Tillings, Limited* (1), in which it was apparently considered that this third finding could not qualify, or take from, the effect of the second finding, and that the second finding, notwithstanding the third, entitled the defendant to a verdict. With the utmost respect, I can hardly think this is so. If the jury in this or any other case found, *on proper evidence*, that the defendants could, by the exercise of care on their part, have saved the plaintiff from the consequence of his own want of care, I think the plea of contributory negligence would fail, because, in the result, the accident was not owing to the plaintiff's negligence, but to the final negligence, as found by the jury, of the defendants, who could have saved the plaintiff from his own want of care.

But for the reasons already briefly indicated, this third finding cannot be sustained, there being no evidence to support it.

As to the second ground, *i.e.* newly-discovered evidence, I do not think a case has been made out for granting a new trial. The note of the evidence which Mrs. Morgan was prepared to give, if examined, has been produced; and while in my opinion it shakes very much the credibility of the story told by plaintiff, her evidence, if she had been or were to be examined, would not be decisive of the case—and while I do not think the trial can, apart from the other grounds already dealt with, be considered satis-

(1) 19 T. L. R. 539.

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factory, where this witness, a most material one, and one who was present in Court to be examined, was not called, yet I do not think that, consistently with the practice of the Court and decided cases, a new trial could be granted on this ground alone.

J. L.

Appeal. May 1.

The plaintiff appealed.

Serjeant Dodd, The Right Hon. J. H. M. Campbell, K.C., and *Cusack*, for the appellants.

Healy, K.C., Chambers, K.C., and *T. S. M'Cann*, for the respondents.

The Court (SIR SAMUEL WALKER, C., and FITZ GIBBON and HOLMES, L.JJ.) dismissed the appeal.

Solicitor for the plaintiff: *James Smyth.*
Solicitor for the defendants: *John M'Cann.*

R. D. M.

IN RE A DEBTOR'S SUMMONS AGAINST MOORE (1).

Appeal.
1906.
Dec. 16, 20.

Bankruptcy—Debtor's summons—Liquidated debt—Particulars of demand—Affidavit in prescribed form—Omission therefrom.

In proceeding by a debtor's summons, the form of the summons and the affidavit in support, as prescribed by the rules, should be strictly followed.

Where the indorsement on the debtor's summons stated the amount due to be £10,000 for money had and received by the debtor for the use of the creditor between the 20th October, 1900, and the 19th October, 1906, and the affidavit in support omitted to state that an account of the particulars had been given to the debtor, and payment had been demanded :—

Held, that the proceedings were not in compliance with the rules, and that the debtor's summons should be dismissed.

APPEAL by John S. Moore, from an order of the Recorder of Belfast, dated the 26th November, 1906, refusing an application by the said J. S. Moore to dismiss a debtor's summons against him by James Moore & Sons, Limited.

By the debtor's summons, dated the 19th October, 1906, the firm of Moore & Sons, Limited, claimed payment within twenty-one days from the said J. S. Moore of the sum of £10,000 for money had and received for their use, and warning him that unless he should secure or compound for the same to their satisfaction, he would have committed an act of bankruptcy, unless he should have within the time aforesaid applied to the Court to dismiss the summons on the ground that he was not indebted to the said Moore & Sons, Limited, in the sum claimed, or that he was indebted to them in a sum less than £20.

The particulars of demand endorsed on the summons were as follows :—

1900, October 20, till 1906, October 19.	For money had and received by you for the use of the said firm of James Moore & Sons, Limited, . . . £10,000

(1) Before SIR SAMUEL WALKER, C., and FITZ GIBBON and HOLMES, L.JJ.

Appeal. 1906. *In re* Moore.

The debtor's summons was grounded on an affidavit by Martin Lynas, the liquidator of Moore & Sons, Limited, in which he stated—

> 1. That John S. Moore, of Mooreville, Antrim-road, Belfast, in the county of the city of Belfast, retired engineer, is justly and truly indebted to the firm of James Moore & Sons, Limited, over and above all just credits and allowances, whether by way of set-off, deduction, or otherwise, in the sum of £10,000, for money had and received by the said John S. Moore for the use of the said firm of James Moore & Sons, Limited.
>
> 2. That the said John S. Moore resides within the jurisdiction of this honourable Court.
>
> 3. That I did, on the 15th day of October, 1906, apply to the said John S. Moore personally for payment of the said debt.

The debtor filed an affidavit in which he stated that he was not indebted to James Moore & Sons, Limited, in the sum of £10,000, nor possibly in any sum whatever. No money was had or received by him for the use of the firm of James Moore & Sons, Limited. He further stated that he was a director of James Moore & Sons, Limited, until its liquidation. No claim in writing had ever been made upon him for the said sum of £10,000, or any part thereof, either by James Moore & Sons, Limited, or by the liquidator. No particulars or details of the said sum of £10,000 or any part thereof were ever furnished to him either by the said firm or by the liquidator. It appeared that prior to 1893 the debtor and his father had for upwards of thirty years carried on the business of engineers and iron-founders. In 1893 the business was converted into a private company under the style of James Moore & Sons, Limited. The capital was £10,000 in 1000 shares of £10 each, the only shareholders being the father and his sons. The debtor was managing director of the Company. On the 2nd June, 1906, the Company resolved to go into voluntary liquidation, and subsequently, on the petition of a creditor, an order was made for the compulsory winding-up of the Company, and Martin Lynas was appointed liquidator. At the end of August, 1906, the liquidator stated to the said J. S. Moore in conversation that he was indebted to the firm in the sum of £10,000. The debtor denied this, and asked for particulars.

Subsequently the debtor and his solicitor had interviews with the liquidator at which particulars were demanded, but, as the debtor stated, they were not furnished.

The application to dismiss the debtor's summons was heard by the Recorder of Belfast on the 26th November, when Mr. Lynas, the liquidator of the Company, was examined. He stated that the debtor was indebted to the Company in the sum of £11,170 15*s.* 9*d.*, the particulars of which he gave as follows:—

	£	*s.*	*d.*
Amount due on cheques to the debtor himself or his nominees,	6751	13	0
Cheques of M'Fadden & Co., London,	323	1	7
Acceptances of the Company for the accommodation of the debtor,	1687	5	4
Shortness of cash,	2198	15	10
Amount debited in the leger,	210	0	0
	£11,170	15	9

The Recorder of Belfast refused the application to dismiss the debtor's summons, and the debtor appealed.

Ronan, K.C., O'Brien, K.C., and *T. J. Campbell*, for the appellant:—

1. The debt must be a liquidated ascertained sum, and the particulars endorsed in this case are not particulars of the debt at all. The effect of this debtor's summons is, that unless the debtor could pay, secure, or compound a sum of £10,000 in three weeks, he has committed an act of bankruptcy. That means that he must pay, secure, or compound the sum specified to the satisfaction of the creditor: *Re Tupper* (1). A debtor's summons cannot be issued to ascertain the amount due on an account.

2. A demand for payment of the debt is essential, and it never was made. The paragraph in the affidavit of the summoning creditor, as prescribed by the Rules, stating that an account in writing of the particulars of demand was sent to the debtor, is omitted; that omission is fatal: *Re a Debtor's Summons* (2). Where a summary process, such as a debtor's summons, is given to a creditor, it is absolutely essential that all the formalities

(1) L. R. 9 Ch. 312. (2) 21 L. T. (N. S.) 802.

Appeal. 1906.

In re Moore.

prescribed by the section of the Act of Parliament, and by the Rules, should be complied with.

3. Where the amount of the debt is not ascertained, and is disputed, the Court cannot make a man bankrupt for that. The proper course in such a case is to put a stay on the order till the amount is ascertained. In this case, the account was a complicated one, extending over a number of years, and it would be impossible, by an examination at the hearing of a motion, to ascertain a liquidated sum.

Serjeant Dodd, Matheson, K.C., and *W. M. Whitaker*, for the creditor:—

The particulars given were sufficient, and the creditor failed to obtain payment after—in the words of section 30 of the Act of 1872—"using reasonable efforts to do so." Moreover, no objection shall be allowed to the particulars unless the Court shall consider that the debtor has been misled by them—see Rule 17. The debtor was not misled, and the Recorder so held. The liquidator had informed the debtor that the claim of the Company against him amounted to £10,000, and there were several interviews at which this claim was put forward. It is difficult, when the amount of the debt is so large, to ascertain the exact sum until the account is fully taken. Now the account has been taken, and the amount due is £11,170 15*s.* 9*d.*

Dec. 20.

Sir Samuel Walker, C.:—

This is an appeal from the Recorder of Belfast, sitting in Bankruptcy. It appears that the firm of Moore & Sons are in liquidation, and the liquidator, on the 19th October, 1906, caused to be issued out of the Local Court of Bankruptcy, Belfast, a debtor's summons against J. S. Moore, who had been managing director of the Company. The particulars of demand endorsed on the summons are:—

1900, October 20, till 1906, October 19.	For money had and received by you for the use of the said firm of James Moore & Sons, Limited, . .	£10,000

The General Orders made under the Act provide that:—

"In matters under the Acts the proceedings may be in the several forms which shall be from time to time prescribed and sanctioned by the Court, or as near thereto as possible, and where forms for any proceeding in such matters are not prescribed, the forms required may be framed by the parties, using as guides those so prescribed as far as they are applicable." (1)

"A debtor's summons shall be in the prescribed form. A creditor desirous that a debtor's summons may be granted, must file an affidavit of the truth of his debt in the prescribed form." (2)

"The particulars of demand shall be endorsed upon or annexed to the summons, and shall be expressed with reasonable and convenient certainty as to dates and all other matters; but no objection shall be allowed to the particulars unless the Court shall consider that the debtor has been misled by them." (3)

The form of affidavit prescribed by the Rules contains in paragraph 3 the following (4):—

"That an account of writing of the particulars of my demand was on or about the day of sent by post [*or* as the case may be] addressed to the said , at , in the of , aforesaid, and that payment of the same has been on more than one occasion required of him."

The debtor's summons was grounded upon the affidavit of the liquidator, but in the present case the above paragraph was entirely erased from the printed form used, and no statement was made as to any particulars being sent, or their amount demanded. The debtor applied by notice to dismiss the debtor's summons, and the Recorder, after hearing the affidavits on both sides, and the oral evidence of the liquidator and his book-keeper, dismissed the application. The debtor did not tender himself for examination. The debtor appealed against the order of dismissal. No adjudication of bankruptcy has yet been made.

Mr. Ronan, in support of the appeal, contended for three propositions—(1) That as the debtor's summons claimed a sum of

(1) Gen. Ord. IX. of the Rules for the Local Bankruptcy Courts in Ireland, made the 28th December, 1888.

(2) Gen. Ord. XV.

(3) Gen. Ord. XVII.

(4) Sch. 2 of Rules of Local Court.

Appeal. 1906.

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£10,000, there could be no act of bankruptcy found for any less or different sum; and even though a sum were found due sufficient in amount to support a debtor's summons under the bankruptcy law, this would not warrant the finding of an act of bankruptcy. (2) That the allegation in the prescribed form of affidavit to found the debtor's summons, which in the present case was deliberately erased, was an essential averment to give jurisdiction, and that the omission could not be cured by evidence given at the hearing. (3) That the nature of the alleged debt, appearing on the affidavits and evidence, was such that no act of bankruptcy could be made out by the examination at the hearing of the complicated accounts, out of which the £10,000 debt was sought to be deduced as a result.

As to the first point, we are of opinion that the appellant's contention is not well founded. The act of bankruptcy is founded on sub-sect. 6 of sect. 21 of the Act of 1872. [His Lordship read the sub-section.]

Section 30 of the Act of 1872 regulates the proceedings in relation to a debtor's summons. [His Lordship read the section.]

Gen. Ord. XV. provides that there shall be endorsed on the debtor's summons, in addition to an intimation of the consequences of neglect to comply with the requisitions of the summons, a notice to the debtor that if he disputes the debt, and desires to obtain the dismissal of the summons, he must file an affidavit in the prescribed form . . . stating that he is not so indebted, or only so to a less amount than £20. We are of opinion that the first ground fails.

2. Having regard to the effect of a debtor's summons, it is right that the procedure prescribed for obtaining it should be strictly followed. A creditor passes by the ordinary procedure of bringing an action, and adopts this summary process, fraught with great consequences to the debtor, and also involving important consequences to all creditors or debtors of the debtor. The swearing to an account in writing of particulars having been sent, and payment having been demanded of the amount shown by them on more than one occasion, is not mere form. It is required to show that the debtor had his mind directed to the particulars of debt and subsequent demand before the grave step of proceeding to bankruptcy was resorted to. It is said that the

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learned Recorder relied on Rule 17. [His Lordship read the Rule.] But here there was a total omission to comply with what is prescribed. In the case of *Re a Debtor's Summons* (1), it was held that it was necessary that the demand mentioned in the Affidavit Form No. 2 should be made, and the particulars of demand also there mentioned should be served, since the 1st January, 1870—the day when the Bankruptcy Act of 1869 came into operation. It was held by the Chief Judge that the omission was fatal. The nearest analogy is a motion for judgment on a specially endorsed writ. Certain formalities are required by Ord. XIV., Rule 1: there must be an affidavit made by the plaintiff, or some person who can swear to the facts, verifying the cause of action, and the amount claimed (if any), and stating that in his belief there is no defence to the action. It was held in this Court, in *Kiely* v. *Massey* (2), following *Lord Bellew* v. *Markby* (3), that the want of the last statement in the affidavit was not cured by the affidavit of the defendant showing that he had no defence. If a party wishes to avail himself of an extraordinary statutory power, a strict conformity with the provisions of the Order is indispensable.

It is not necessary to enter into Mr. Ronan's third ground, and seeing that the debtor came up when *viva voce* evidence was given, and heard it sworn that £11,000 was due, and abstained from being examined, I am not to be supposed as implying that this third ground could be availed of.

On the second ground of Mr. Ronan's, I think the objection to the debtor's summons is good, and its dismissal should have been ordered, and consequently the appeal should be allowed.

FITZGIBBON, L.J.:—

We agree that, though the appeal is allowed, the appellant should not get any costs, because his case was not brought forward at the proper time, or in the proper form.

On the main question, which is important, I take the broad view that the procedure by debtor's summons, in its essence, is not a process for the recovery of a debt, but is a procedure to bring

(1) 21 L. T. (N. S.) 802. (2) 6 L. R. Ir. 445. (3) 2 L. R. Ir. 185.

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about an act of bankruptcy, which affects the *status* of the debtor, and the rights of his creditors. The act of bankruptcy is the failure to pay an ascertained and liquidated debt, within a fixed time after a demand for payment made in the prescribed manner and form; two things must be clearly proved—(1), the existence of a liquidated debt; and (2), default in payment of that debt after it has been demanded in the prescribed manner. The creditor must show that the prescribed proceedings have been taken. He can establish an act of bankruptcy if the debt is shown to be a liquidated sum of not less than £20, notwithstanding his having demanded more. But in this case I can find no proof of any liquidated debt, ascertained at the time either of the demand or of the default, of the character necessary to make default in its payment an act of bankruptcy.

The reason why no particulars were given was because no particulars existed; the creditor himself states that he did not adopt the prescribed form of affidavit, because he had not then ascertained the amount due to him; and he candidly explains that the reason why he did not ascertain it was because it would have cost money, time, and trouble to do so. That is treating this precedure as if it was an action of account. In other words, the creditor's affidavit left it still necessary to ascertain the debt by a subsequent proceeding, or by further evidence. Under such circumstances, in my opinion, the default in payment was not an act of bankruptcy.

HOLMES, L.J.:—

The difficulty that Mr. Ronan suggests would arise where, on a motion to set aside a debtor's summons, it appears that the sum specified in the summons is not due, but that the debtor owes more than £20 is, in my opinion, imaginary. He says that it would be unjust if the debtor were obliged to secure or compound for the sum originally named as a condition to avoid bankruptcy. In this I agree; but there would be no necessity for his doing so if the order of the Court were to declare the sum found by it to be due, and to stay proceedings on the summons for a reasonable time, so as to give an opportunity for the payment of such sum. In the present case, there is no doubt that the debt largely exceeded £20,

and, if there was no other objection to the summons, I should be quite prepared to consider the evidence given before the Recorder as to the amount of the debt, which, on the debtor's own admission, is at least £7000, and make an order on the lines I have mentioned. There is, however, an objection to the debtor's summons, which is, in my opinion, fatal. The summons must be supported by an affidavit in the form prescribed by the Rules of Court, and this form shows that particulars of the debt must be served on the debtor previous to the issue of the summons. In such a summary and drastic proceeding as that commenced by a debtor's summons, prescribed provisions ought to be strictly followed; and the service of particulars is not a merely formal requirement, but a matter of substance. In this case there was not only no service of particulars, but it is admitted that the particulars were not ascertained before the issue of the summons. If, as I thought at first, the point had not been taken in the affidavit on which the notice to dismiss the debtor's summons was grounded, I should have regarded it as waived; but I find that a second affidavit was filed on the same day, in which the objection was taken in the clearest terms. I, therefore, think that the appeal must be allowed.

Solicitor for the appellant: *William Alexander.*
Solicitors for the respondents: *Cleaver & Fulton.*

R. D. M.

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Oct. 31.
Nov. 1, 30.

GREAT SOUTHERN AND WESTERN RAILWAY CO., APPELLANTS; LEYDEN, RESPONDENT (1).

Justices—Summary jurisdiction—Service of summons in another county, not being an adjoining county—Petty Sessions (Ireland) Act, 1851 (14 & 15 *Vict. c.* 93), *sect.* 11.

Where a summons is issued by a Justice of a county in which an offence punishable on summary conviction has occurred, requiring a defendant to appear and answer to a complaint in respect of such offence, there is no jurisdiction, under the Petty Sessions (Ireland) Act, 1851, to serve the summons in another county, not being an adjoining county, so as to enable the Justices of the county in which the offence occurred to hear and determine the case in the absence of the defendant.

CASE STATED under 20 & 21 Vict. c. 43. The case set out as follows:—

"At a Petty Sessions holden in and for the district of Charleville, in the county of Cork, on the 12th February, 1906, before the undersigned Justices of the Peace and the R.M. acting in and for the said county of Cork, in the Petty Sessions District aforesaid, one Martin Leyden, the above-named defendant, was charged with and by a certain summons, at the suit of the above-named Great Southern & Western Railway Co., for that the said defendant, Martin Leyden, did, on the 7th day of October, 1905, at Charleville Railway Station, in the Petty Sessions District of Charleville and county of Cork, unlawfully and wilfully obstruct and impede, by assault, P. Manaher, an officer of the complainants, while in the discharge of his duty at Charleville Railway Station aforesaid, contrary to the statutes in such cases made and provided; and the said Justices, respectively, being then present, the complaint was duly heard before us, and it appearing from the evidence of Patrick Manaher, one of the complainants' servants aforesaid, that the defendant did assault and obstruct him in

(1) Before LORD O'BRIEN, L.C.J., PALLES, C.B., and ANDREWS, JOHNSON, GIBSON, MADDEN, BOYD, KENNY, and WRIGHT, JJ.

the discharge of his duty; and upon such hearing it having been proved that the defendant lived in the county of Galway, the majority of the Justices decided they had 'no jurisdiction.' And whereas the said Great Southern & Western Railway Co. has, pursuant to the provisions of the before-mentioned statute, given us notice and required us to state and sign a case setting forth the facts and grounds of our determination, in order that they might take the opinion of the said Court thereon. Now, we, the said Justices . . . . , do hereby state and sign a case as aforesaid as follows :—

"On the case being called, the solicitor for the prosecution quoted *The Cork Market Trustees* v. *The Justices of Cork* (1) affecting the jurisdiction of local Justices. And whereas, after due deliberation of above, the three undersigned Justices (forming the majority of the Court) were of opinion that they had no jurisdiction, they dismissed the case without prejudice. And, therefore, the judgment of the Court is required as to whether we, the said Justices, were correct, in point of law, in our determination as aforesaid, or as to what should be done in the matter."

Bourke, K.C., and *Gerald Fitz Gibbon*, for the appellants.

Ronan, K.C., and *Hoare*, for the respondents.

LORD O'BRIEN, L.C.J. :— Nov. 30.

Can a summons be served generally throughout Ireland outside the local limits of the county for which the magistrate issuing the summons is in commission, so that the accused can, if he does not appear, be proceeded against in his absence in that county? To put the concrete case, can a person who is alleged to have committed an offence in county Cork be *effectively* served with a summons in county Galway, which is not the county in which the offence was alleged to be committed or an adjoining county? This is the question which we have to determine, and which came some twelve years ago before the Queen's Bench Division, and, though the matter was then twice argued, remained

(1) 32 L. R. Ir. 542.

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undetermined, as the members of the Court differed in opinion. The case I refer to is the case of *The Queen* v. *The Justices of Cork* (1).

Owing to the difference which existed, I thought it well to invite the presence of the body of the Judges of the King's Bench Division, so that the question might be finally determined. I am glad to say we have arrived at a practically unanimous decision on the question. Before I address myself to the considerations which have influenced our decision, I think it well to record our appreciation of the great erudition displayed in the judgments which were delivered in the former case, and to acknowledge the great assistance we have received from these judgments. Many matters deserving the gravest consideration have been submitted to us which were not brought before the Judges in that case.

But, to come to the general question, how is it to be resolved? In my opinion, by reference to the Petty Sessions Act; by ascertaining the true construction of that Act.

Before, however, I apply myself to a consideration of its provisions, I might perhaps refer to the practice and state of the law which existed before it was passed. There is no trace of any practice in Ireland which in any way sanctioned the proposition contended for by the complainants in this case. There is no trace of any practice sanctioning the contention that a summons may be served generally throughout Ireland outside the local limits of the jurisdiction of the magistrate who authorises the issue of the summons. On the contrary, the practice was the other way. It is stated in the first volume of Messrs. Nun and Walsh's Justices of the Peace (at p. 164) that some few statutes authorise the service of the summons beyond the jurisdiction of the Justice granting it, as the Corporation Act, and one of the statutes relating to burning land, which allows the endorsing of the summons by a Justice of another county. This statement plainly implies that there was, in the opinion of the profession, no power to serve a summons generally throughout Ireland. This statement may be regarded as a correct statement of the practice prevailing up to the time when Messrs. Nun and Walsh's book on Summary Jurisdiction was written, that is to say, in the year 1844.

(1) 32 L. R. Ir. 542.

Mr. Molloy, at p. 32 of his excellent work, states in a footnote to section 11 of the Petty Sessions Act, as follows:—"It is not to be inferred, however, that a Justice ought only to issue his summons against parties residing in his own Petty Sessions district, or that a person ought not to be summoned to appear at any Petty Sessions out of the district in which he resides. On the contrary, every magistrate has authority to summon to his Petty Sessions any person residing *within his county.*" This passage clearly implies that Mr. Molloy, representing the general practice and opinion of the profession, thought that the power to serve a summons was confined to service within the county for which the magistrate issuing it was in commission. An identical passage is to be found in Mr. Montgomery's Justice of the Peace, at p. 24 of the 3rd edition of that book, which was published in 1872. Messrs. Nun and Walsh's treatise was, as I have said, written in 1844; Mr. Montgomery's in 1872; and Mr. Molloy's in 1890—the three treatises covering a period of about fifty years.

In the Burning Act, the 5 Geo. 3, c. 10, s. 1, referred to, it is not alone specially provided that the summons may be served outside the local limits of jurisdiction; but, with a view to so doing, there is an express provision for the backing of the summons—a provision which I need not say does not exist in our Petty Sessions Act. Undoubtedly, the general practice before the Petty Sessions Act did not warrant the service of the summons outside the territorial limits of jurisdiction. It was never done without express authority to that effect. In this connexion I might refer to the Charitable Loan Funds Act, 6 & 7 Vict. c. 91, s. 30, where an express power was given to a magistrate to summon the person sought to be charged, whether, in the words of the statute, he did or did not reside within the jurisdiction of the magistrate who issued the summons. See also the Prevention of Cruelty to Animals Act, 12 & 13 Vict. c. 92, s. 15. The Legislature, when it desired to confer authority to have a summons served outside the limits of local jurisdiction, knew how to do so, and did so unambiguously in express words. This, then, was the practice and state of the law when the Petty Sessions Act passed. Did that Act alter the law or practice?

Before I refer to the various relevant provisions of the Petty

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Sessions Act, I think it essential to examine the quality and character of a summons. Was it mere notice, or was it process? We are unanimously of opinion that a summons is judicial process, and not a mere notice, and that the direction to serve such process outside the local limits of jurisdiction is an exercise of jurisdiction. The summons is a *command* to appear. If there be no appearance, there may be the arrest of the defendant, or the determination, in his absence, of the complaint or charge made against him. There is a command to appear, and a clear sanction for not appearing. Perhaps the most important case on this subject was that referred to by my Lord Chief Baron at an early stage of the argument, *La Compagnie Générale d'Eaux Minérales et des Bains de Mer* (1). There Mr. Justice Stirling, in a valuable judgment in which he drew the distinction between an unauthorised and an authorised notice, said that the notice served in the particular case was not merely a notice that something was going to be done which would affect the accused, but that the jurisdiction of the Court was to be invoked as against him exactly as if he had been resident within the county, and that, therefore, the service should be set aside, as there was no authority to serve a notice outside the territorial limits of jurisdiction, namely, in Paris. It is, in my opinion, plain that a summons, such as a summons in this case, issued under statutory authority, and possessing a coercive efficacy, was process as distinguished from mere notice.

Well, then, it cannot be disputed—it is, indeed, admitted—that an authority to exercise jurisdiction outside the local limits of jurisdiction must be expressly conferred by statute, or must rest on the clearest implication derivable from the general tenor of any particular statute. As to the effect of unauthorised service of process outside the jurisdiction, I may refer to what Cotton, L.J., said in *In re Busfield* (2):—"Service out of the jurisdiction is an interference with the ordinary course of the law, for generally Courts exercise jurisdiction only over persons who are within the territorial limits of their jurisdiction. If an Act of Parliament gives them jurisdiction over British subjects wherever they may

(1) [1891] 3 Ch. 450. (2) 32 Ch. D. 131.

be, such jurisdiction is valid, but, apart from statute, a Court has no power to exercise jurisdiction over anyone beyond its limits." These observations are adverted to by Stirling, J., in *In re La Compagnie Générale d'Eaux Minérales et de Bains de Mer* (1). All this applies *a fortiori* in the case of tribunals of inferior jurisdiction. This jurisdiction is not expressly conferred by the Petty Sessions Act. Is it impliedly conferred by that statute? In my opinion, clearly not. The implication derivable from a consideration of the statute as a whole, so far from pointing to the existence of such an authority, points in the opposite direction. I do not think there is any necessity for the existence of an authority which might involve great expense, hardship, and danger, to the subject —the expense and hardship of being compelled to come, say from Donegal to Kerry, at the risk, if he did not come, or could not come, through want of means, or otherwise, of having a charge against him disposed of in his absence—and all this whilst there is in the statute an express authority to proceed against him where he resides, an all-important provision which does not exist in Jervis's Act. Under the provisions of the Civil Bill Act a defendant must be sued where he resides. Is it to be said that a tribunal of far inferior jurisdiction can, in reference to every petty alleged liability, drag him across the entire island?

But it is argued, or rather I should say asserted, that a summons and a warrant are co-extensive in operation, and that if a warrant is available outside the local limits of jurisdiction, so must a summons be. This contention is, in my opinion, no more than mere assertion. It does not at all follow, that because a person served with a summons under the second clause of section 10, for a minor offence, can, in default of appearance, be arrested and brought up under a warrant, that, therefore, a summons and a warrant have a co-extensive efficacy. I am not dealing with a proceeding against a party charged with an indictable offence. In that case, Messrs. Nun and Walsh, at page 164 of their book, rightly say the summons is used merely as a notice to avoid the harsh proceeding of issuing a warrant in the first instance, and not strictly as process. Summons and warrant under the second clause of

(1) [1891] 3 Ch. 450.

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section 10 work together, so to speak, where a summons may be served, that is, within the county for which the magistrate directing its issue is in commission. In that instance the warrant is ancillary to the summons. But the warrant, in relation to matters outside the county, has, when backed, an efficacy of its own wholly unconnected with the summons, and this crucial difference is effected by the process of backing, which, by the statute, is made applicable in the case of warrants, and does not apply in the case of summonses. A new and distinct tribunal adds a new and distinct efficacy to the warrant. In fact, that which did not exist as a warrant for external counties is made a warrant—an *efficacious* warrant—for those counties, by the action of an external tribunal. It is to be observed that the process of "backing" is made for the first time applicable when the defendant is in an outside or foreign county: see clause 2 of the 26th section of the Petty Sessions Act; see also sections 27, 28, 29, 30, and 31, as to the process and the effect of backing. All these sections are conversant with areas, with places, external to the county in which the warrant was originally issued. The 29th section of the Petty Sessions Act illustrates the effect of backing. It deals with an English warrant coming to Ireland; of course, such a warrant is merely so much paper when it comes to Ireland. It has, when it arrives in Ireland, no efficacy. It is the process of backing therein described that gives it vitality, and makes it an effective instrument: see section 31. The marginal note to that section, that warrants, when backed, are made valid for execution, correctly represents its effect. Once a warrant (I am speaking generally, not of a warrant issued under the 11th section for execution in an adjoining county) leaves the county where it was originally issued, it bears with it no potency whatever from the magistrate who originally signed it. It derives its efficacy from the Inspector-General, or the Deputy Inspector-General, or Justice, who endorses it; and it is to be remembered that the Inspector-General and Deputy Inspector-General are, by statute, made Justices of the Peace for the entire of Ireland.

Well, then, let me look back; let me ask what becomes of the argument that a warrant is efficacious throughout Ireland, and so ought a summons to be. The refutation of this contention is that a

warrant is made to run by the express provision as to backing, and no such provision exists as to summonses. The argument, then, as to the alleged co-extensiveness of summons and warrant, in my opinion, wholly fails.

But what else have we? What else have we, bearing in mind that a summons is a judicial process, and that a direction to serve it is an exercise of jurisdiction, and that the issuing for service outside the county where it is issued is an exercise of jurisdiction outside that county? We have a clear distinction in the opening lines of the 10th section between what is styled *within the jurisdiction of the original magistrate*, and the other counties in Ireland where the defendant or accused person may reside. He may be proceeded against "within the limits of the jurisdiction," or elsewhere in Ireland where he resides. The local limits of jurisdiction are defined by section 7 of the Petty Sessions Act; and it appears to me that this section 7 is wholly inconsistent with a power in the magistrate to direct service generally throughout Ireland—to make a summons a coercive process outside the limits of the county for which the magistrate is in commission: see the various sub-sections of the 7th section. But it is said this section 7 deals with what are called local limits of jurisdiction. Granted. But are not these local limits prescribed in order to define the area of the exercise of jurisdiction? and if this is so, is it not clearly inconsistent with the provision of that section to exercise jurisdiction—that is to say, to issue a summons—a process—for service outside the limits thereby prescribed? *The King* v. *Chandler* (1), though not a decision upon the point before us, is an illustration of how the Courts will confine the exercise of jurisdiction to the local limits of jurisdiction.

But now I come to the final clause of the 11th section, which I always, since I formed an opinion as to its true construction, have thought threw much light upon, if it did not determine, the question under discussion.

There are various factors in the case, besides this concluding clause of the 11th section, which point, I think, very clearly to the result at which we have arrived—for instance, the new provision

(1) 14 East, 267.

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which is not in Jervis's Act, but which is in the Petty Sessions Act, which enables the defendant or the accused to be proceeded against where he resides; but, in my opinion, the 11th section, even if it stood alone, would practically close the controversy. I cannot help thinking—I say so with great deference—that the importance which the clause deserves was not attached to it in the previous discussion. My brother Gibson certainly examined the clause most critically. It will not do merely to state what appears to be the result of this clause. Its language must be critically examined. This was done, as I have said, in the most elaborate way by my brother Gibson, at pages 560 and 561 of the report of the former case. I can add nothing to his analysis of the section. I adopt it. Perhaps I may say I cannot strike out or ignore the plain language of that section. It gives in so many words the true description of a civil summary process, that is to say, "cause of complaint." The words "such party," in the phrase "to compel the appearance of such party," necessarily, unless we are to ignore plain language, include a defendant in civil process, and his appearance may be compelled by the service of the summons. The opening language of the 11th section says so in so many words, and there most decidedly is a clear sanction if the defendant does not obey the summons, because the complaint may be heard in his absence—a provision of cardinal importance. A warrant is not applicable to a civil case. The defendant in such a case may be compelled to appear otherwise than by warrant, that is to say, by summons; and the form of summons given in the schedule to the Petty Sessions Act, (B a), is equally applicable to civil cases and offences, and we find it described in the schedule to the Act as process to enforce appearance; and this schedule is by the 48th section of the Act to be deemed part of the Act. If a summons in a civil matter is effective—coercive—why does not an identical form, identical language, identical treatment, make a summons in the case of an offence equally so? The 20th section of the Petty Sessions Act is equally applicable to both. If it be deemed expedient to enforce the personal presence of the accused, a warrant may be issued under the concluding words of the 11th section. A warrant may be issued as ancillary to the summons, or it may be issued independently of it, if the character of the

offence and the circumstances of the case render that course expedient. But I will not refer further to this section. My brother Gibson exhausted the topic in his judgment. Perhaps I ought to apologise for the too great persistence with which I pressed during the argument the necessity for a detailed examination of its language.

This express power to serve a summons in the adjoining county plainly negatives the power contended for by the complainant here—namely, a power in the magistrate to issue the summons for service generally throughout Ireland. This 11th section, in my judgment, concludes the controversy; but if it does not conclude the controversy, it is at least a very material factor.

I come now to what appeared to have so much effect on Lord Justice Holmes and my brother Madden in the former discussion, namely, the practice in England. No doubt the practice in England is to serve a summons throughout England generally. At least it is stated in English text-books that it may be done, but this practice was never sanctioned by an authority directly on the question. I have shown, by reference to the text-books, to Nun and Walsh, Leslie Montgomery, and Mr. Constantine Molloy's work, that the practice in this country was plainly the other way. I may say for the last that he certainly was one of the most eminent criminal lawyers this country has produced; and I have stated, what in my experience was undoubtedly the fact, that the opinion of the profession here was that a summons could not be served, without express authority to do so, throughout Ireland generally. But it must never be lost sight of that there is in our Petty Sessions Act an express power to proceed against the defendant where he resides—a provision which is not to be found in Jervis's Act; and then there is also in our Petty Sessions Act, which is not to be found in Jervis's Act, the concluding clause of section 11, which, in my opinion, expressly authorises the service of a summons in an adjoining county—a provision inconsistent, as I have said, with the alleged power of a magistrate to direct a summons to be served generally throughout Ireland. *Expressio unius est exclusio alterius.*

As to the argument founded upon section 13, as to the express

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provision therein contained that witnesses can be served only within the jurisdiction, this is, in my opinion, merely a declaratory statement of what would be otherwise implied. As to the case of *Reg.* v. *Lightfoot* (1), which was so much adverted to, it must be remembered that the jurisdiction in bastardy was as ambulatory as the woman who sought to enforce the liability cast upon the father of her child. I entirely agree with what my brother Gibson said with reference to it. Contrary to the general maxim, *Actor sequitur forum rei*, the Bastardy Statutes make jurisdiction to follow the person of the complainant, and thus afford a persuasive argument for implying a right to bring into Court defendants out of the jurisdiction.

Then, on the whole case, whether we regard the practice and state of the law before the Petty Sessions Act, or the special provisions of that Act, there is, in my opinion, no authority in a magistrate who issues a summons to direct its service generally through Ireland. But though I have gone into the practice and state of the law before the Petty Sessions Act, I am quite content to rest my judgment on the provisions of that Act alone—especially those distinctive provisions which are not to be found in Jervis's Act.

My brother Boyd, who is unable to be present, desires me to say that he concurs in the judgment of the Court.

(1) 6 E. & B. 822.

PALLES, C.B. :—

The question is whether Justices of a county, within which an offence punishable on summary conviction is alleged to have been committed, have jurisdiction to hear and determine that charge in the absence of the person accused, when service on him of the summons has been effected outside the county and not within an adjoining county.

Such a summons, framed as it is under statutable authority, in the language of command, and imposing, in the case of disobedience, liability to arrest, or to the determination of the complaint *in absentiâ*, is, in my opinion, not merely notice affording the defendant an opportunity of appearance, but is judicial process (*Berry's Case* (1)), and its service is an exercise of the jurisdiction of the Court: *La Compagnie Générale d'Eaux Minérales et de Bains de Mer* (2). To adopt the language of Stirling, J., in the latter case, the service "is not merely a notice that something was going to be done which would affect the accused, but that the *jurisdiction of the Court was to be evoked as against him*, exactly as if he had been resident within the" county. It follows from this, and from the admitted principle that a Court whose jurisdiction is limited by locality cannot, at Common Law, exercise that jurisdiction outside its local limits, that it must be shown that there is statutable authority authorising the service here. That statutable authority, if it exists, must have been derived from our Petty Sessions Act, 1851 (14 & 15 Vict. c. 93); and thus the question depends upon the construction of that Act. That construction was exhaustively considered, thirteen years ago, by the Queen's Bench Division in this country, in *The Queen* v. *The Justices of Cork* (3), which was heard by the present Lord Justice Holmes and my brothers Johnson, Gibson, and Madden, JJ. Of these, Mr. Justice Johnson did not express any opinion upon the question here. He based his decision upon other considerations. Each of the other three Judges considered the question with much fulness of detail, and, if I may respectfully say so, brought in aid every consideration which ripe learning and acute reasoning

(1) 1 Bell, C. C. 59. (2) [1891] 3 Ch. 450. (3) 32 L. R. Ir. 542.

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could suggest as tending to lead to a conclusion. In result, they differed in opinion. Holmes, L.J., and Madden, J., held that the jurisdiction did exist; Gibson, J., arrived at an opposite conclusion, stating, nevertheless, that "his impression had shifted more than once," and that he did not hold his opinion "with much assurance."

The case has been twice argued. We have received from the learned counsel every assistance; and, whilst the case has stood for judgment, the Judges have met more than once to discuss the question in all its details. For myself, I may say that I have not only read and re-read the elaborate judgments I have referred to, but that I have, to the best of my ability, tested every step in the reasoning of each of them. The conclusion at which I have arrived is that, were it not for the introduction into sect. 10 of our Petty Sessions Act of a few words which do not occur in the section in the corresponding English Act (11 & 12 Vict. c. 43)—from which sect. 10 was mainly taken—and for a provision at the end of sect. 11, to which there is no equivalent in the English Act, the construction of the English and Irish Acts ought to be identical; and that, upon that construction, there would be jurisdiction to serve the summons in the foreign county. I have, however, not without some fluctuation of opinion, arrived at the conclusion that the introduction of those words into sect. 10 effectually removed the basis upon which the extended construction which has been given to the English Act must have rested, and that the provision in sect. 11, taken in connexion with the above words so introduced, affirmatively evidences a more limited intention, and consequently that the extended construction cannot be given to the Irish Act.

The introduction into section 10 of the Irish Act of the words I refer to, had, in my opinion, the effect, if, indeed, its very object were not to prevent what, in Ireland at least, would have been a hardship, of a defendant being liable to be brought up from one end of Ireland to the other to answer summary proceedings, including those for small money demands, although, by an Act passed in the same Session of Parliament (14 & 15 Vict. c. 57), his liability to be sued in the Civil Bill Court in respect of those money demands, and those for much larger civil demands, was confined to

the Court of his own county. This distinction between the English and Irish Acts is mentioned by Gibson, J., in *The Queen* v. *The Justices of Cork* (1); but I cannot find any reference to it in the other judgments, so that the overriding effect which I feel bound to attribute to these words can hardly have been insisted upon there in the arguments of the learned counsel. The words to which I refer are those which, after conferring a jurisdiction, as in England, on the Justices of the county in which the offence is alleged to have been committed, proceed to confer jurisdiction also on the Justices of the county of the defendant's residence.

The distinction, then, between the English and the Irish Act is this: Upon the one hand, under the former, the jurisdiction to hear and determine a charge of an offence punishable only on summary conviction is vested only in the Justices of the county of the alleged offence, so that, if the defendant did not reside in the county, and could not be personally served within it with a summons, there would not be, upon the limited construction, any Court capable of summoning him, or of investigating the charge. Thus, justice might be defeated by the impossibility of making guilty persons amenable. The intention of the Act, however, being clear, that the Justices of the place of alleged commission, being the *sole* tribunal, should have jurisdiction over *all* such cases, whether the defendant were or were not resident within the county, it followed that the machinery provided by the statute for bringing alleged offenders before it should be read, so far as it were possible consistently with the true rules of construction, as co-extensive with the jurisdiction intended to be exercised. The necessity of effectuating the intention of the statute was amply sufficient to prevent the usual presumption applicable to local Courts restricting such general words as those in section 1 of Jervis's Act to service within the county. There was on the face of the statute that which negatived that construction. Indeed, even if Jervis's Act had not made any provision for service of a summons, I should have thought that jurisdiction to serve it in any

(1) 32 L. R. Ir. 563.

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county would have been implied; because without it the Justices could not exercise the jurisdiction expressly given to them for the public benefit. The maxim, "*Quando lex aliquid alicui concedit, conceditur et id sine quo res ipsa esse non potest,*" is as old as Lord Coke (1).

Upon the other hand, under the Irish Act jurisdiction is given as well to the Justices of the county of defendant's residence as to those of the county of the offence; and as the statute allows service at the residence, the above reasoning is inapplicable to that Act.

The defendant may not reside in the county of the offence, and may leave it so rapidly that personal service cannot be effected on him within it, but justice will not be thereby defeated in this country, as, were the limited construction given to Jervis's Act, it might be in England. He is still amenable to effective process, but to the process of the Justices of the county of his residence, not to that of those of the county of the alleged offence. The more I have considered this view of the case, the more am I persuaded of its strength.

Upon this ground alone, and without reference to section 11, I should be quite prepared to hold that the extended construction could not prevail.

I pass now from section 10 *per se*, in order to take it in connexion with the provision at the end of section 11.

The substance of that provision, which was fully examined by Gibson, J., is that where the county of the offence adjoins the county of the defendant's residence, the summons of the Justice of the district of the offence may be served in the adjoining county. I think that the express provision, that under special circumstances the service may be had outside the county of the Justice, implies that in the absence of such circumstances the service must be within it. The provision, so far as it relates to service, cannot find effective operation by reading it as dispensing with the necessity of "backing," because the section, in my opinion, deals with the service of summonses as well as with the execution of warrants, and the Act does not contain, as did some previous ones, a provision for the

(1) 12 Rep. 131.

backing of summonses. It follows that were we to read it as suggested it would not have any operation whatsoever so far as it authorises service in an adjoining county—and a construction involving such a result is the very last which should be adopted.

As regards backing, the section referred to by the Chief Justice—the 29th—which enables an English warrant when backed to be executed here, shows that the backing does not extend the local limits of the jurisdiction of the Justice, but adds a *statutable* force and efficacy to the warrant of a court which it had not from the nature of the court. The fact that, under certain circumstances, a *warrant* has by statute efficacy beyond the county, does not involve the *summons* having an extra-county efficacy. As to one document the Legislature has, and as to the other it has not, conferred that additional efficacy. For this reason, I cannot accept the proposition, which would appear to be the basis of one of the judgments in *The Queen* v. *Justices of Cork* (1), that the locality within which the summons of a local court may be served outside its local limits is co-extensive with that within which a backed warrant may be executed.

I base my judgment on the above considerations, which, on full consideration, have satisfied me that the service in the present case is insufficient. There are many subsidiary topics which have been discussed. These I do not deem it necessary to consider in detail, as I have read with great pleasure and deep interest the learned discussion of them in the judgment which will be read by Gibson, J., in which I entirely concur.

Andrews, J.:—

It has been admitted that the question we have to determine, though not very distinctly presented by the case stated, is whether the Justices at Petty Sessions in Charleville, in the county of Cork, had jurisdiction to hear and determine, in the absence of the defendant, the charge against him of an offence, subject to their summary jurisdiction, committed at Charleville, when the summons

(1) 32 L. R. Ir. 542.

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had been served on the defendant in the county of Galway, where he lived, which was outside the jurisdiction of those Justices, and was not a county adjoining the county of Cork. It will be observed, therefore, that the question is one of general importance. I shall, as briefly as I can, state my reasons for holding that the Justices had not such jurisdiction.

I think it clear, and it was not disputed during the argument of the case, that the summons was process, and not mere notice, and that the issuing of it was an exercise of jurisdiction. Whatever a summons, or its equivalent, to appear before Justices to answer a complaint may originally have been, the 11th section of the Petty Sessions Act (14 & 15 Vict. c. 93), in my opinion, shows beyond doubt that such a summons now is process. I do not rely on the words "process to enforce appearance" at the head of that section, for I regard them as a side-note; but the language of the section is clear. It deals with complaints both in civil cases and criminal cases (in which I include offences), and prescribes the manner in which persons against whom *any* such complaints shall have been received by any Justice "*shall be made to appear*" to answer them. Sub-section 1 deals with indictable crimes and offences, in which either a warrant or a summons may be issued as provided thereby. Sub-section 2 enacts that "in *all* cases of summary jurisdiction the Justice may issue his summons (B a) directed to such person" (*i.e.*, the person complained against), "*requiring* him to appear and answer to the complaint." "B a" refers to the schedule to the Act, which by the 48th section is to be deemed to be part of the Act. In the schedule we find the heading "Form (B).—Process to enforce appearance." Form (B a) is the summons form, (B b) is the warrant to arrest form, and both are given under the same heading of "Process to enforce appearance." The form of the summons (B a) is applicable for either a defendant or a witness, and, after stating the complaint, it proceeds in these words: "This is to *command* you to appear as a" (defendant or witness, as the case may be) "on the hearing of said complaint." It is to be signed by a Justice of the county, and addressed to the person summoned.

The summons then being process, and the issue of it an exercise of jurisdiction, statutory authority is requisite to enable it to be

effectively served out of the territorial jurisdiction of the Justice who issues it, as his jurisdiction, unless enlarged by statutory authority, is limited to the county or place for which he holds his commission. If such enlarging statutory authority exists, it must be found in the Petty Sessions Act. It has not been suggested that it is to be found elsewhere. It is nowhere expressly given by that Act. Is it then given thereby by implication? To establish that it is, the implication ought to be clear. What must be shown is an enlargement by the Act of a limited jurisdiction. Now, in the first place, such enlargement is not necessary for the working of the Act, or the administration of justice under it, in relation to crimes and offences. The 10th section makes express provision for proceeding against an alleged offender in the jurisdiction within which he resides, or is found, though the alleged offence was committed outside that jurisdiction. Finding such an express provision in the Act, I would not expect also to find authority given by it to a Justice within the limits of whose jurisdiction an alleged offence was committed (suppose in the county of Donegal) to issue a summons to be served on the alleged offender (suppose in the county of Cork), upon service of which the alleged offender, being in the county of Cork, could be tried and convicted, in his absence, in the county of Donegal, if he did not travel up, possibly some hundreds of miles, from Cork to Donegal to answer the complaint; and I may observe that offences subject to the summary jurisdiction of Justices of the Peace are in many, if not most, cases charged against persons of small, if any, means. It is a very serious thing to place an accused person in danger of being tried and convicted in his absence. No one will differ from what Cockburn, C.J., said in *R.* v. *Smith* (1) with reference to this (even where the power to do so exists), viz.: "To convict an accused person unheard is a dangerous exercise of power, there being an alternative mode of procedure." I can see no necessity, and I might add no excuse, for conferring on Justices, in a case like the present, an authority admitting of such dangerous exercise. The Legislature, however, could give it, and the question

(1) L. R. 10 Q. B. 607.

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is, has it done so by the Petty Sessions Act, and that, too, not expressly, but by implication?

I return to the 11th section, and if there be found in it a limited authority expressly given in relation to a summons, inconsistent with the existence of a general authority to serve it anywhere in Ireland, this, in my opinion, would be almost conclusive against the implication of such general authority from anything elsewhere contained in the Act. The 11th section deals with, and provides for, process to enforce appearance in both civil and criminal cases, such process being by summons and by warrant to arrest. The concluding portion of that section must be construed. It is a part of the entire section. To suggest that it was inadvertently introduced would not be to construe it; but it discloses no inadvertence that I can see. In my opinion, it recognizes the limited territorial jurisdiction of a Justice of the Peace, and, to a limited extent, expressly enlarges that jurisdiction in relation to a summons. The words by which it does so are the following:—"In every case where the offence shall have occurred or the cause of complaint shall have arisen within the Petty Sessions district for which the Justice issuing any such summons or warrant shall act, but the party or witness to whom such summons shall be directed, or against whom such warrant shall be issued, shall reside in an adjoining county, it shall be lawful for such Justice to compel the appearance of such party or witness at the hearing of the charge or complaint within such district, in like manner as if such party or witness resided in such district, although such Justice may not be a Justice of such adjoining county." The words I have quoted clearly apply, as the section applies, to both civil and criminal cases, and in construing these words effect must, in my opinion, be given to them as applicable to both civil and criminal cases, and the words, "to compel the appearance of such party," as applied to a complaint in a civil case, can only mean compel by summons, for no warrant to arrest could issue in such a case, and the words "compel the appearance" are, in my opinion, properly applicable to a summons, although also applicable to a warrant to arrest. I have already referred to the commencement of the 11th section, which deals with both civil and criminal cases, and provides for the manner in which persons

against whom a complaint shall have been received by a Justice *shall be made* to appear, and in a civil case, this can only be done by a summons. The form of the summons in the schedule is (as I have already said) the same for both civil and criminal cases, and is given under the heading of "Process to enforce appearance," and the summons is, by its express terms, a *command* to appear. It has also the sanction, when served, that, if not obeyed, it enables the complainant to proceed in the absence of the defendant (section 20)—a very influential mode of compelling him to appear, although in cases of offences there is, for obvious public reasons, an additional means of compelling appearance, viz.: by warrant to arrest. Adopting, therefore, as I do, this construction of the concluding portion of the 11th section, it, in my opinion, excludes an implication derived from any other part or parts of the Act of an authority to a Justice to issue for service out of his jurisdiction in any part of Ireland the process of a summons, by giving express authority to issue it for service out of his jurisdiction in an adjoining county only.

The words "or witness" in the concluding portion of the 11th section were, in my opinion, manifestly added to the words "the party" in order to extend the power in the 13th section of compelling the attendance of a witness to the case of a witness residing in an adjoining county; and I see no reason for supposing that the words "or witness" were introduced by inadvertence or mistake. A reference to the 13th section makes them, as I think, quite intelligible. I may also observe that the 12th section, which provides for the manner in which summonses shall be served, seems to be much more applicable to service within the jurisdiction of the Justice who issues them than to service in any county in Ireland.

In the Summary Jurisdiction Act (14 & 15 Vict. c. 92), which was passed at the same time as, and is in *pari materiâ* with, the Petty Sessions Act, special provisions are made for summoning persons charged with the particular offences committed in public roads or streets which are referred to in sections 10, 11, 12, and 13 of that Act. It is obvious that many offenders in these cases might, after the commission of the prohibited acts, soon pass out of the jurisdiction in which they are committed, and,

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accordingly, in these particular cases, the Act, by section 14, makes "special provisions" for proceeding against them, and enacts, in sub-section 1, that the county and sub-inspectors, head and other constables of the constabulary, shall take cognizance of all such offences, and shall in every case where the name and residence of any such offender are known, or can be ascertained, summon him either before the Justices of the Petty Sessions district in which the offence shall be committed, or before the Justices of any other Petty Sessions district in which such offender may reside, or be, at the time of taking such proceeding, and such Justices are thereby authorised to hear and determine such case; and sub-section 5 enacts that any summons issued by any Justice requiring any owner, driver, or guard of any public stage-carriage to appear before him to answer any complaint for any such offence shall be deemed good and sufficient service in case the same be left with the known or acting book-keeper, or with any person having the care of any office where places are usually taken or parcels received for such carriage. These provisions, like those of section 10 of the Petty Sessions Act, certainly do not favour the view that there is a general authority to effectively serve a Justice's summons anywhere in Ireland.

With reference to the argument that, as a warrant to arrest, which derives its efficacy from the issue of it by the Justice who grants it, will run throughout Ireland if duly backed, so the alternative process for enforcing appearance by summons, which likewise derives its efficacy from the issue of it by the Justice who grants it, should also be held to be effective for service throughout Ireland, the first observation I have to make is that nothing would have been easier than that, if so intended in a matter of such importance, the Act should have expressly so stated, and, when expressly providing, as it did, for such execution of the warrant, have also provided expressly for such service of the summons, as to which, however, it is silent, save as regards what I consider to be its express provision for the service of a summons in an adjoining county. But further, although the backing of a warrant is administrative, and backing is necessary in cases of warrants in proceedings as to offences issued in any Petty Sessions district, having regard to section 25, sub-section 1, which requires such

warrants to be addressed to the sub-inspector, or head constable of constabulary, who shall act for the place where the Petty Sessions for such district shall be held, still the warrant cannot be executed outside the jurisdiction of the Justice who issued it, save in an adjoining county, without being backed. I do not think it material that the backing is *administrative*. The Act expressly provides this mode of making the warrant capable of being executed anywhere in Ireland. The backing does not enlarge the jurisdiction of the issuing Justice. It gives an efficacy to the warrant which as issued it had not, and without the prescribed backing it cannot be so executed; but no similar provision is made for enabling the process by summons to be served anywhere in Ireland, which, if intended, could so easily have been done, and, when express provision was made for warrants, would have been naturally so done for summonses. I am wholly unable to imply statutory authority for the service of the summons anywhere in Ireland from either the nature of, or the provisions respecting, warrants, especially having regard to what I consider to be the true construction of the concluding portion of the 11th section.

It is said that the practice in England since Jervis's Act of 1848 (11 & 12 Vict. c. 43) is to serve a Justice's summons anywhere in England, and that no exception has been taken to this practice. The legality of it does not seem to have been either questioned or decided. I am unable to accept the passage in Lord Selborne's judgment in the House of Lords in the bastardy case of *Berkley* v. *Thompson* (1), as even approaching to a decision on the legality of such a practice; but I do not feel concerned to consider, and I have no jurisdiction to determine, the legality of this practice in England. Even if legal, it cannot either interpret or control the Petty Sessions Act. There does not seem to have ever been any such practice in Ireland, and certainly not since the Petty Sessions Act, and no inconvenience appears to have arisen from the absence of it. Jervis's Act, though *in pari materiâ* with the Petty Sessions Act, is by no means identical with it. It contains provisions which the Petty Sessions Act does not, and the important provisions I have referred to in sections 10 and 11 of the Petty Sessions

(1) 10 A. C. 45, at p. 48.

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Act are not to be found in Jervis's Act, and the Petty Sessions Act cannot be construed by Jervis's Act, even if, on the true construction of that Act, the English practice is authorized thereby, which it may be, but I offer no opinion on that question. Neither can the Petty Sessions Act be construed by Acts not *in pari materiâ* with it, whether prior or subsequent to it. Decisions on the wholly different Bastardy Acts are valueless, in my opinion, for construing the Petty Sessions Act. A number of other Acts were referred to during the argument, with a view to show that effect could not be given to their provisions unless the Justice's summons to answer complaints of violations of those provisions could be served out of the jurisdiction of the Justice who issued it. I refrain from an investigation or discussion of any of those Acts. They are different from the Petty Sessions Act, and may or may not imply a power to effect such a service in the cases they deal with, and no decision, either that they do or do not, can decide the question we have to determine, or, in my opinion, legitimately assist us in the determination of it.

Further considerations may be presented in support of the opinion I have arrived at, but I am content with the reasons I have given for it. I am of opinion that the service of the summons in the present case was unauthorized, and that the Justices were right in holding that they had no jurisdiction to hear and determine the complaint in the absence of the accused.

Johnson, J.:—

I agree that the Justices were right in their decision that they had no jurisdiction in this case. The jurisdiction of a County Justice is derived from his commission, which is purely local; it is extended by statutes conferring summary jurisdiction, which is a creation of statute, and their special provisions therefore must be strictly pursued. The rule for *jurisdiction* is laid down in *Peacock* v. *Bell* (1), cited by Willes, J., in *Mayor of London* v. *Cox* (2): "The rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a Superior Court but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior

(1) 1 Wms. Saund. 74d. (2) L. R. 2 H. L. at p. 259.

court, but that which is so expressly alleged." Therefore, rules of construction of statutes by which a Superior Court may infer an intention of Parliament to give jurisdiction to effectuate the intention of the statute have no application to an inferior court, where the jurisdiction given to it by Parliament must be "*expressly alleged.*" The Justices' court, whether in or out of Petty Sessions, is an inferior court. That the summary jurisdiction in Ireland is essentially different from the summary jurisdiction in England, is remarkably illustrated by the Acts of 1861. The Larceny Act, 1861 (24 & 25 Vict. c. 96, s. 105), and the Malicious Injuries Act, 1861 (24 & 25 Vict. c. 97, s. 62), contain summary provisions for making the offender amenable, and extend to the United Kingdom of England and Ireland; but the Petty Sessions Amendment Act, 1862 (25 & 26 Vict. c. 50, s. 3), enacts that these provisions "relating to the mode of compelling the appearance of persons punishable on summary conviction, shall not extend to Ireland . . . . and all proceedings as to the *compelling the appearance of any person against whom any such complaint* shall have been made, or of any *witness*, and as to the hearing and determination of such complaints, and as to the making and executing of any orders relating thereto, shall be subject in all respects to the provisions of the Petty Sessions (Ireland) Act, 1851, as amended by the Act of 1858, when the case shall be heard in any Petty Sessions District." The statements in English text-books, that a summons issued by a Justice of one jurisdiction may be served in any other jurisdiction in England, except when served at the place of business of a Friendly Society, have no application to Ireland. No such proposition is to be found in any Irish text-book, though all of them state the local limit of jurisdiction of the Justice; and, in Nun and Walsh, Justices of the Peace, p. 164, ed. 1844 (which the Lord Chief Justice has referred to), it is stated, by way of exception to the local limits of the jurisdiction of the Justice, and in accordance with the rule in *Peacock* v. *Bell* (1): "Some few statutes authorize the service of the summons beyond the jurisdiction of the Justices granting it," and instances of its being

(1) 1 Wms. Saund. 74d.

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"expressly alleged" are given from some ante-union Burning Acts, which provide for endorsement of the summons in a different jurisdiction, like backing a warrant under the Petty Sessions Act, and the Municipal Corporation Act, 1840—to these may be added the Charitable Loans Act, 6 & 7 Vict. c. 91, s. 30—in all of which statutes the extended summary jurisdiction of the Justice is "expressly alleged." The Petty Sessions (Ireland) Act has been in force for more than fifty years, but, except in *The Cork Case* (1), this Court has never been called on to decide the existence of this alleged jurisdiction of a Justice in Ireland to compel the appearance of a defendant by summons outside the local jurisdiction or an adjoining county. We are, therefore, not fettered by English statutes or English practice, and the solution of the present question depends on the construction of the Petty Sessions (Ireland) Act, 1851, and its amending Acts. The Irish Petty Sessions Act was passed three years after Jervis's English Acts, and differs from them in many essential respects, as pointed out by Gibson, J., in *The Cork Case* (1), suggesting the reasonable inference that Parliament, having Jervis's Acts so recently before them, thought fit to make the alterations for Ireland in summary jurisdiction different from the provisions of Jervis's Acts, and, as I have said, the present question depends not on English statutes, but on the construction of the Petty Sessions (Ireland) Act.

This Act is divided into groups of sections, each of which is introduced into, and as part of, the Act, by an appropriate provision describing the subject-matter thereinafter dealt with in sub-sections. Section 12 deals with service of summons: "The manner in which summonses shall be served shall be subject to the following provisions":—1. The Justices shall appoint a summons-server for the district. 2. The constabulary shall serve a summons in cases prosecuted by them, "but in all other cases" [the summons] "may be served by the summons-server of the district" or any person employed by the complainant and permitted by the Justice, "but in no case by the complainant himself," and the fees provided by the 41 & 42 Vict. c. 69 would be absolutely incommensurate with service out of the jurisdiction or the adjoining

(1) 32 L. R. Ir. 542.

county. 3. Service must be personal, or if the defendant "cannot be conveniently met with," then by leaving the copy summons at his office or place of business, and by section 35 wilful default in serving a summons is punishable by penalty not exceeding forty shillings. All the provisions of the sub-sections are local.

Section 7. "The powers of Justices and others to act in and for different localities shall be subject to the following provisions:—

1. "A Justice for any county may act as such in all matters arising within such county, although he may at the time happen to be in an adjoining county, provided he shall be also a Justice for such adjoining county." 2. And also though he may at the time happen to be in any city, town, or place being a county of itself within or adjoining his own county, whether or not he is a Justice of such city, town, or place. 3. The Inspector-General of constabulary or either of the deputy-inspectors being a Justice of any county may act in all matters arising within such county, wherever he may happen to be at the time. By 6 Wm. 4, c. 13, s. 5, these constabulary officers are Justices for every county, county of a city, or town, in Ireland.

Here the jurisdiction of the county Justice is "expressly alleged"; and if Parliament contemplated this extended jurisdiction for which the complainants in the present case contend, it would be expected that it would have been found here.

Section 11 is headed "*The manner in which persons* against whom any such informations or complaints as aforesaid" (sect. 10) "shall have been received by any Justice shall be *made to appear* to the same shall be subject to the following provisions":—1. In all cases of indictable crimes and offences (where the information is in writing and on oath) by warrant, or if the Justice shall think that the ends of justice would be thereby sufficiently answered, by summons . . . and *whenever such person shall afterwards appear* or be *brought before such Justice,* he shall proceed according to the provisions thereinafter contained as to taking the evidence against such person and committing him for trial. This first sub-section requires the personal attendance of the accused. Sections 25 and 26 provide for the execution of the warrant either in the county, or in the case of fresh pursuit in the adjoining county, without being backed. Elsewhere it must be backed for execution: sect. 27.

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There is no provision in the Petty Sessions Act for endorsing a summons for service beyond the jurisdiction. 2. Comprehensively deals with every subject of summary jurisdiction civil and criminal. "In all cases of summary jurisdiction the Justice may issue his summons (B a) directed to such person, requiring him to appear and answer to the complaint." The proceeding is commenced by summons compelling appearance. Section 48 provides that the schedule "shall be deemed" (there is no magic in the word *deemed*: it simply means shall be taken and construed as) "part of the Act." Reading, then, (B a) as part of the Act, it is:—

FORM (B). PROCESS TO ENFORCE APPEARANCE.

(B a) SUMMONS.

Complainant; / *Defendant.* Petty Sessions District of , County of

WHEREAS a complaint has been made to me that

This is to command you to appear, &c.

(Signed),

Justice of said County.

This day of , 190 .

To , of .

Disobedience to the summons when duly and lawfully served involves, in cases of offence, arrest; and in all other cases that the case may be heard and disposed of *ex parte* followed by the execution of the order on the hearing. In the present case if this coercive and judicial summons was operative to enforce in county Galway the appearance of the defendant at Charleville, in county Cork, it would be by virtue of the jurisdiction of a Justice for the county of Cork operating in the county Galway where the Cork Justice is, as Dalton says, "but a private man": Dalton, c. 6, p. 25, ed. 1677.

The summons in England is entirely different. See Paley, p. 634, 8th ed.

The final paragraph of sect. 11 sums up the jurisdiction both as to warrant enforcing appearance in offence cases, and summons enforcing appearance in civil cases: "in every case" where the offence or cause of complaint arises in the Petty Sessions district for which the Justice issuing the warrant or summons shall act, "but the party or witness" (sect. 13) "to whom such summons shall be directed or against whom such warrant shall be issued, shall reside in an adjoining county, it shall be lawful for such Justice to compel the appearance of such party or witness at the hearing of the charge or complaint within such district in like manner as if such party or witness resided in such district, although such Justice may not be a Justice of such adjoining county." Witness is here introduced because sect. 13 refers to witness within the jurisdiction of the Justice, and this provision extends to the adjoining county. If Parliament intended that the Justice should have the extended jurisdiction for which the complainant in the present case contends, it would have been "expressly alleged" here; but the limitation of the jurisdiction to the adjoining county negatives a jurisdiction extending to a county which is not an adjoining county.

GIBSON, J.:—

This prosecution was under the Railway Regulation Act, 3 & 4 Vict. c. 97, section 16, for wilful obstruction of a railway official. The section enables the offender to be seized and detained until he can be brought before a Justice for the county or place where the offence has been committed. The problem before us is whether the alleged offender can be brought before the Court of summary jurisdiction on a summons served in a county not being an adjoining county. Unquestionably, the statute of 1840 contains no express or implied special power authorising such service. Mr. FitzGibbon, therefore, in his excellent argument, contends (1) that before the Petty Sessions Act, wherever a Justice had jurisdiction to issue a summons, he possessed an inherent power, unless the special statute excluded it, to command service in any county; (2) that the Petty Sessions Act did not interfere with this

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power; that it was similar to Jervis's Act; and that the present service was regular. Mr. Bourke mainly relied on the Petty Sessions Act, which, according to his view, contemplated service anywhere in Ireland.

I have already discussed the point incidentally in *The Cork Case* (1). I have carefully reconsidered the matter with the assistance of the new and full argument at the Bar. I shall state my present view.

I. What was the Irish law before the Petty Sessions Act? It is elementary that a Justice's jurisdiction was bounded by his county, except where he also was Justice for an adjoining county, when by statute he enjoyed special extended powers. Summary jurisdiction was of two kinds, under the commission, and under statute. Under the former jurisdiction, the Justice originally probably convened the offender before him by warrant, or by a form of precept resembling a warrant. See form in Lambard in Surety of Peace Cases. Later on a precept or summons of the present type came into use. I have no doubt that such precept or summons, as a general rule, could only have been enforced within the Justice's county. No trace in any authority or book, from the time of Lambard, Crompton, and Dalton down, has been discovered by counsel to the contrary. I have looked into the Irish books, such as Bolton (1750), Bullinghooke (1788), MacNally, Nun and Walsh (editions 1841 and 1844), and Hayes, and none of these authors hints at the existence of a general jurisdiction in a Justice to order a person outside his county to be summoned. Until *Lightfoot's Case* (2) English books and cases are also silent on the point. That case was decided on legislation expressly excepted from the general operation of Jervis's Act, save as to backing warrants, &c.

With regard to summary jurisdiction created by statute, it was of three kinds: (1) for minor offences amounting to a breach of the peace; (2) for minor offences not involving such breach; (3) for civil cases. In most of the early statutes the mode of procedure, whether by warrant or summons, is not specified. The first Irish statute that I have found in Mr. Cullinan's collection, allowing Justices to punish summarily, is 7 Wm. 3, c. 9 (Ir.).

(1) 32 L. R. Ir. 542. (2) 6 E. & B. 822.

The earliest Irish statute referring to summons that I have met is 6 Anne, c. 17. In many of the statutes nothing is said as to the conditions of the Justice's jurisdiction, this being left to the Common Law implication. In others there are express provisions exhibiting a great variety of procedure; the prosecution or complaint might be where the offence or cause of complaint arose; or where defendant resided; or in both places; or where the complainant resided, or applied to the Justice. In this last type of legislation there is an inevitable implication of extended jurisdiction. There may be other cases where the intent and purview of the Act may justify a similar inference. Some of the statutes referred to by counsel may be of this class, but I do not pause to consider them, as, beyond doubt, the statute on which this prosecution is based contains no materials for any such implication. The point, therefore, is whether, dealing with the period before the Petty Sessions Act, in every case where summons was authorized without more, a Justice could direct the service of such summons in a foreign county. No decision or work—English or Irish—has been cited in support of an affirmative answer. Parliament, apparently, considered that, without legislation expressly or impliedly enlarging the Justice's authority, jurisdiction to order service beyond the county did not exist. I mention examples, covering nearly a century, which may be distributed into four groups :—

(*a*) 3 Geo. 3, c. 29, sect. 1 (Ir.), directed against the burning of land, prescribed as the procedure a summons, and in default of obedience a warrant. 5 Geo. 3, c. 10, sect. 1 (Ir.), amended this enactment by authorizing a Justice in a foreign county to endorse and back such summons. Why was this? If under general law the power to summon carried with it jurisdiction in the home Justice to direct service anywhere, the amendment was unnecessary and unmeaning. The fact that the offence was peculiar to Ireland cannot affect the matter. The jurisdiction of the Justice, and not the nature of the offence, is the point. It will be noted that, as in the Petty Sessions Act, sect. 11, sub-sect. 2, the summons here must precede the warrant. These statutes are set out in Mr. Cullinan's edition of the Irish statutes then in force.

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(*b*) The Loan Fund legislation supplies a still more instructive illustration. Under 4 Geo. 4, c. 32, sect. 5, a loan was recoverable by civil bill or before Justices. Civil-bill jurisdiction was limited to the forum of the defendant. Had the Justices a wider jurisdiction? Under 6 & 7 Wm. 4, c. 55, jurisdiction was given to the tribunal where the defendant resided. This was enlarged by 1 & 2 Vict., c. 78, which enabled the complaint to be disposed of, either where the Loan Society carried on business or where the defaulter resided. Now observe the codifying statute 6 & 7 Vict., c. 91, sect. 30. It preserved the alternative forum, but expressly enabled the summons to be served in a foreign county.

(*c*) A third example is to be found in the Prevention of Cruelty code. Under the original Act, 3 Geo. 4, c. 71, sect. 1, the Justice, where the offence was committed, had jurisdiction to bring the offender before him by warrant or summons. Under 5 & 6 Wm. 4, c. 59, s. 15, and 12 & 13 Vict. c. 92, s. 15, there were like powers as to warrant and summons, but the summons was expressly made to run beyond the jurisdiction of the summoning Justice.

These three examples all refer to distinct and considered amendment of the law, and cannot be accounted for by the assumption of inaccurate or mistaken drafting. In the Burning Code and Prevention of Cruelty Acts, the extended jurisdiction as to service of summons is associated with warrants which could be enforced by backing.

(*d*) A fourth illustration is the Municipal Corporation Statutes, 3 & 4 Vict. c. 108, section 161, 5 & 6 Wm. 4, c. 76, section 101, and 45 & 46 Vict. c. 50, sect. 223, all of which extend the operation of a summons to a seven-mile radius beyond the borough. On the prosecutors' argument this legislation was futile and misleading; without it, a Justice, clothed with a power to summon, had already, as a necessary incident to such jurisdiction, authority to direct service not only within seven miles, but anywhere in Ireland. As a borough justice is expressly brought within the Petty Sessions Act by sect. 44, if Mr. Bourke's argument is correct, sect. 161 of 3 & 4 Vict. c. 108 then became useless, and should have been repealed.

At the time the Petty Sessions Act was passed it was well

settled that in summary jurisdiction a summons, which purported to compel by command; which, unless otherwise expressly provided, must have been personally served: *R.* v. *Hall* (1); *R.* v. *Cummins* (2); and which enabled a decision to be pronounced on the merits, was in the nature of process: *Reg.* v. *Lightfoot* (3), and was essential to found jurisdiction. A Justice who orders service outside his own county, and acts on such service *in absentiâ*, plainly exercises jurisdiction beyond his proper county. Before the Petty Sessions Act, unless the statute under which he was acting expressly (as in the instances cited), or by clear implication (as in the Bastardy legislation) otherwise authorized, the Justice had no authority to make a summons run as valid process in a foreign county. The statute 3 & 4 Vict. c. 97, sect. 16, supports no such implication, and I must hold that before the Petty Sessions Act the present summons could not have been ordered to be served, and could not have been enforced by service, beyond the range of the proper territorial jurisdiction.

II. This, however, does not decide the case. The Petty Sessions Act was a consolidating and amending Act, intended to substitute a uniform system for the irregular and diverse provisions of the various statutes regulating summary procedure. It covers the entire field of magisterial jurisdiction, whether under commission or statute, whether criminal or civil, whether for indictable crimes or minor offences. The question is—Does the statute recognize or confer the jurisdiction claimed? If the statute confined jurisdiction to the locality of the offence (as Jervis's Act does), the matter would present much greater difficulty, as in an Act prescribing procedure for all kinds of cases, an inference of enlarged power to convene a non-resident defendant might be drawn; but in precise terms our statute extends, by section 10, jurisdiction to the place where the defendant resides. It embraces civil claims as well as prosecutions; and if under our civil-bill code a defendant cannot be sued away from the county of his residence, it would hardly seem likely that in a trifling Petty Sessions case Parliament would permit the defendant to be haled into Court from a remote home, at grievous inconvenience

(1) 6 Dowl. & Ry. 84. (2) 8 Dowl. & Ry. 344. (3) 6 E. & B. at p. 824.

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and expense, the hardship being all the greater from the illusory scale of costs. The capacity to sue where defendant resides indicates, *primâ facie*, that the summons in the home venue is not to operate beyond it. This is exemplified by 6 & 7 Vict. c. 91, sect. 30, already cited, where a choice of two venues is offered, and an express power of serving anywhere is given, Parliament thereby declaring that otherwise such power would not exist.

In construing the statute we must keep in mind the familiar principle that general or fundamental rules of law are not taken to be altered, save so far as the statute manifests plainly an intention to make such alteration. Does our Act declare a clear intention to enlarge the boundary of jurisdiction beyond the county? Does it alter in the case of summonses the broad rule (peculiarly applicable to inferior local courts) *actor sequitur forum rei*, notwithstanding that section 10 enables such rule to be followed, and notwithstanding the policy of the Civil Bill Code?

Section 11 includes all offences, indictable and otherwise, and also civil complaints. Its first and last paragraphs apply to all summonses. If the words "process to enforce appearance" are part of the statute, like the headings of the Act in *Eastern Counties Railway Company* v. *Marriage* (1), and are not a marginal note, a civil summons is treated as compelling appearance. Taking, however, the words as a marginal note, or omitting them altogether, I think the result is the same. In both statutes and case law a summons to which a warrant is inapplicable is described as compelling appearance. The Summary Jurisdiction Act, section 1, applies to civil complaints as well as offences, and directs that all proceedings as to compelling the appearance of any person or witness shall be subject in all respects to the provisions of the Petty Sessions Act. As the section extends to civil summonses, the words "compel appearance" in relation to such summonses would appear to describe a summons duly served as compelling appearance. The language must be read distributively; in the case of offences, the appearance compelled is actual; in the case of civil complaints, the appearance compelled must be constructive, as no formal entry of appearance is required. In *Forbes* v. *Lloyd* (2)

(1) 9 H. L. Cas. 32. (2) 1. R. 10 C. L. at pp. 563, 564.

section 17 of the Act was under consideration; it contained a provision enabling the magistrate "to cause all the parties to be brought before him." This language was held not to justify arrest. See also *Shergold* v. *Holloway* (1).

The first paragraph of section 11, like the last, extends to all Justice's procedure, and contains the words "made to appear," that is "compelled to appear." If the words mean physical appearance, they do not apply to civil complaints, and the clause must be read as if it contained an exception "save in the case of civil complaints"—a violent and unnecessary construction.

Sub-section 1 deals with indictable offences, and authorizes, at discretion, either summons or warrant. In the case of serious crimes, wider powers might be allowed than would be desirable in civil or minor offence procedure. Where the actual or physical appearance of the accused is essential, a summons is, in its essence, a notice, as it has *per se* no compulsive effect; if disobeyed, it must be followed by a warrant. This peculiarity of such a summons is pointed out in Nun and Walsh. It is suggested that such summons can be legitimately served anywhere. If it is a mere notice, to avoid the harshness of a warrant, the point now discussed could never arise; as, whether there was a summons or not, a warrant would be the sole means of compelling actual appearance, the sanction of adjudicating *in absentiâ*, expressly given by section 20, being wanting in such case. In practice, I have never known, save by consent, any case where in felony or misdemeanour a summons was served in a foreign county. I am unable to see in sub-sect. 1 any indication of intent to enable a Justice to command service in a foreign county. If the accused is not within the jurisdiction, he can be, and always is, brought before the Court by warrant if he declines to appear otherwise. The final paragraph of section 11, to be considered presently, appears to make the matter clear.

Sub-section 2, which must be read as prefaced by the paragraph at the beginning of section 11, covers civil complaints—to which no warrant is applicable—and offences, for which a warrant may be granted, subject to the condition (save in exceptional cases) that there has been a previous summons personally served. It is worthy of remark that Jervis's Act

(1) 2 Strange, 1002.

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treats the complainant in a civil case as entitled to compel the personal appearance of the defendant. This power, which was not given by the previous law: *Shergold* v. *Holloway* (1), is expressly excluded by section 11, sub-sect. 2. The concluding paragraph is decisive. In terms the paragraph extends jurisdiction in all cases against a party residing in an adjoining county, by enabling the Justice to compel the appearance of such party. This extended jurisdiction is confined to the Justice of the original county where the offence has been committed or cause of complaint has arisen; it is not given to the Justice of the county where defendant resides, if the summons is issued in such county.

It is argued for the prosecutor that, as to civil summons, the paragraph works *in vacuo* having no subject-matter to operate on, or is a blunder; and reliance is placed on the association of "witness" with "party." On the other hand, defendant contends that "witness" is brought in by mistake—an explanation which I cannot accept. This point about the witness I propose to deal with later on. As the witness spoken of may be witness in a civil as well as in a criminal case, the mention of the witness cannot in any view give much assistance. For two reasons, I am unable to adopt the prosecutors' construction. In the first place, it deprives the express enactment of all value so far as relates to civil summonses, notwithstanding that the clause professes to deal with such summonses. Secondly, in offence cases, a previous summons is, normally, a condition to the issue of a warrant, and is made part of the procedure, just as it was in the Burning Acts already cited. If the prosecutors' argument is correct, and "appearance" means physical or actual appearance, which can only be compelled by warrant, the reference in the section to summons is throughout unmeaning. As a warrant, whether preceded by summons or not, is the sole means of compelling actual appearance, the clause, on the view suggested, should have omitted all reference to summons, and should have been confined to authorizing, against a defendant in an adjoining county, the execution of a warrant without backing. Supposing that the summons spoken of is an offence summons only, if such summons is treated as a necessary part of the machinery for

(1) 2 Strange, 1002 (1735).

compelling appearance, being, as it is, normally a condition to the issue of a warrant, service would seem to be expressly authorized in the adjoining county, and therefore in no other. On the other hand, if such summons is not part of the machinery for enforcing appearance, why is summons mentioned at all? Even therefore as regards offence summonses the complainants are in a dilemma. But in truth their argument makes havoc of the entire drafting, and substitutes a wholly different enactment. Three times over, in the Summary Jurisdiction Act, section 1, in the initial clause of section 11 of the Petty Sessions Act, and in its final paragraph, a summons, which must cover a civil complaint, is referred to as compelling appearance. If such civil process is deemed to have that operation, it is not questioned that in all summonses of a process character, service can only be commanded and carried out within the prescribed limited areas. The provision in sub-section 2, enabling in offence cases a warrant to be issued if the defendant is keeping out of the way, points also to territorial limitation; it suggests action against a home-county defendant, not some one in a remote county.

It is said that this construction makes the words "compel appearance" have two different meanings in the same sentence; that is, in case of warrants, actual appearance, and in case of summonses, constructive appearance. So far as regards civil complaints, this is certainly true; but this is not any insuperable objection. The words must be construed according to the nature of the subject-matter as contemplated by the Legislature. There are many examples of this diversity of interpretation in both case law and in statutes. *Forth* v. *Chapman* (1) is an example in a will. *Barr's Case* (2) and *R.* v. *Donegal Justices* (3) illustrate statutes. When the statute declares that it is dealing with civil as well as criminal cases, and expressly excludes warrants in civil cases, we must, to give the enactment any effect, interpret "compel appearance" as referring to constructive appearance secured by due service of the summons enabling an adjudication on the merits to be made.

There are some subordinate arguments that require notice. The express restriction of jurisdiction in the case of witnesses

(1) 1 P. Wms. 663. (2) [1905] 2 K. B. 113. (3) [1903] 2 I. R. 533.

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imposed by section 13, and the absence of such express restriction in the case of parties, are relied upon as indicating that a party can be served anywhere. Section 13, I think, only reproduces the general law as it stood before the Act, as I mentioned in *The Cork Case* (1), whereas the prosecutors' construction of sect. 11 alters the previous fundamental rule as to the limits of jurisdiction. Whatever view, however, is taken of sect. 13, it cannot control or cancel the clear enactment in sect. 11. A minor point on sect. 13 might be suggested. A complainant might require a defendant as witness. It would be odd that in his character of party such defendant could be served anywhere, but as witness only in the limited area.

The authority to back warrants is said to recognize jurisdiction in the magistrate beyond his own county. Such an argument finds no support in authority or principal. In the Burning Acts authority to back is extended to the summons as well as the warrant, and the Prevention of Cruelty Statutes, which allow a warrant that could be backed, expressly enlarge the operation of the summons. The express legislation in these statutes shows that authority to issue a warrant, whether conditionally on a summons being disobeyed or otherwise, was not understood by Parliament to extend the operation of the summons as process into every county where the warrant could be backed; that is, over the whole of Ireland. Backing is no doubt ministerial, but Parliament, by giving power to back warrants, cannot be therefore deemed impliedly to recognize an antecedent, tacit jurisdiction in the original Justice to operate beyond his own territory. The power to back, and the effect of such backing, depend on express enactment, which defines and limits the authority. It gives force to the warrant and extends its operation, without enlarging the jurisdiction of the original Justice. No similar extension is given in the case of the other judicial process called summons, either expressly or by implication. Sections 29 and 30, to which my Lord has referred, are conclusive against the view that the power to back supposes a jurisdiction to make a summons run everywhere. They relate to backing of warrants issued by tribunals having no judicial authority in Ireland.

(1) 32 L. R. Ir. 542.

The early statutes as to backing will be found in Nun and Walsh; they are all post-Union. The special provisions as to backing contained in the Burning Code would suggest that the procedure was (apart from statute) regarded as inapplicable, at least in offence cases not relating to breach of the peace.

III. Much reliance was placed on Jervis's Act and the English practice on which Holmes, J., based his judgment in *The Cork Case*. (1) There, however, the Petty Sessions Act was not directly before the Court for interpretation, and many of the arguments now considered were not advanced or discussed. Had Lord Justice Holmes enjoyed the assistance of the present argument, he might have accepted our conclusion.

The Bastardy Cases, on which the English practice is based, were decided on statutes making the inference of extended jurisdiction irresistible. Jervis's Act, s. 35, excludes such cases from the general operation of the Act. The nature and limits of summary jurisdiction, and the statutes to which I have referred, were not mentioned or considered in those cases.

The conclusive answer is, however, the radical difference between Jervis's Act and our Act. The former statute (which is confined to summary jurisdiction) restricts jurisdiction to offences and acts committed within the jurisdiction of the Justice, and complaints upon which the Justice has authority by law to order payment of money or otherwise; our statute, sect. 10, extends jurisdiction to the place of residence, and has a more limited definition of civil "complaints." The English statute in civil cases enables a warrant to be issued if a summons is not obeyed, and such summons need not be served personally; in offence cases it allows warrant or summons at discretion; our Act makes warrants inapplicable to civil cases; in offence cases it requires normally a summons personally served as a condition precedent to the issue of a warrant. Jervis's Act has nothing corresponding to sect. 12 of our statute as to service and costs of service, &c. Finally, the English statute has no counterpart to the first and last paragraphs of sect. 11 in our Act, or sect. 1 of the Summary Jurisdiction Act. I do not question the English practice, but it does not apply to our legislation.

(1) 32 L. R. Ir. 542.

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I am of opinion that the Petty Sessions Act confines summonses relating to offences and complaints within the specified limits. In the original county, the Justice may command and enforce service in an adjoining county, but not beyond. In the residential county, his authority is limited to his own proper county. Section 10 prevents any inconvenience in practice, and by itself would seem to exclude any inference of extended jurisdiction. Even without the assistance of the last paragraph of sect. 11, reading the Summary Jurisdiction Act and Petty Sessions Act together, I would, like the Chief Baron, arrive at the conclusion that a Justice could not award process by summons to be enforced beyond his defined area of jurisdiction. In inferior local Courts, the general rule is said to be that the person proceeded against must be resident: *Mayor of London* v. *Cox* (1). The principle ought not, without clear statutory warrant, to be departed from in the case of a Justice whose position Plowden (p. 37) likens to that of a sheriff. Where the forum is ascertained by the residence of the defendant, the place of service of process under the local jurisdiction is similarly circumscribed. If in a summary complaint brought in the county of residence the defendant can only be served within the county boundary (of which I am satisfied), must not a similar restriction apply to the alternative venue, the county of origin, with enlarged jurisdiction? The limited extension of the ambit of jurisdiction makes the case all the stronger. It would seem an intolerable hardship that a complainant in a trivial civil or minor offence case should be at liberty by the exercise of arbitrary choice to pass by the residential venue and force a distant defendant to come before a remote Court at oppressive inconvenience and cost, which might be such as to make it impossible, or not worth while, for such defendant to appear and resist.

My judgment, for the above reasons, is against the complainants.

I wish to add that in *The Cork Case* (2), which turned on the Railways Clauses Consolidation Act, and not on the Petty Sessions Act (which only came incidentally under consideration),

(1) L. R. 2 H. L. at p. 270. (2) 32 L. R. Ir. 542.

the argument was addressed mainly to the general question of Justices' jurisdiction to summon, and not to the question whether the statute of 1845 justified a special inference of extended jurisdiction. My judgment is not intended to conclude any such question, should it again arise (which is unlikely) on legislation outside the operation of the Petty Sessions Act.

MADDEN, J.:—

The question involved in the present case came before the Court of Queen's Bench thirteen years ago, in the case of *The Queen* v. *Justices of Cork* (1). The Court was equally divided, Mr. Justice Johnson and Mr. Justice Gibson holding the service invalid; while Lord Justice Holmes (then Holmes, J.) and I were of a contrary opinion. I cannot say that further consideration of the question, in the light of the arguments addressed to us on the present hearing, has led me to change the opinion which I then formed. But I do not propose to deliver a judgment on this occasion, for two reasons: First, if I were to do so, I should do little more than repeat what has been already said by myself, and, in substance, by Lord Justice Holmes. And, secondly, because the decision of this Court is an adjudication which I willingly accept as authoritative and final upon an important point of practice which has remained in uncertainty for many years. For this reason, I do not dissent from the judgment of the Court.

KENNY, J.:—

I agree with the decision announced by my Lord Chief Justice. The summons was one for unlawfully and wilfully obstructing an official of the complainant Company in the discharge of his duty at the Railway Station at Charleville, in the county of Cork. In the title of the summons the defendant is described as Martin Leyden, of Kiltiona, Dunmore—and at foot it is addressed to him as "Martin Leyden, of Kiltiona, Dunmore, Galway." It came before a Petty Sessions Court, at Charleville aforesaid, and the Justices being "of opinion they had no jurisdiction, dismissed the case without prejudice." On the requisition

(1) 32 L. R. Ir. 542.

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of the complainants, they stated the present case, from which it would appear that the only evidence adduced before them was in proof of the alleged obstruction, and that the defendant lived in the county of Galway. It is not stated whether the summons was served, but, for the purpose of argument, we have assumed that the defendant was served in the county of Galway, and, failing to appear, that the complainants required the Court to dispose of the case in his absence, pursuant to the 20th section of the Petty Sessions Act, Ireland. To justify such a course, it must have appeared to the Justices that the summons was duly served. I take it they were satisfied as to actual service, but that they considered it was not such service as they could take cognizance of, inasmuch as it was effected outside of their jurisdiction. The question for our decision consequently is, whether, in a summary jurisdiction case, the summons to the defendant can be validly served in a county other than that where the offence was committed, and other than an "adjoining county," within the meaning of the concluding paragraph of sect. 11 of the Petty Sessions Act.

The point is a very important one, and not susceptible of an easy solution. In the year 1893, in the case of *The Queen* v. *The Justices of Cork* (1), it was exhaustively dealt with by three Judges of this Division—two of whom, Gibson and Madden, JJ., are members of the Court which has heard the arguments in the present case. The third Judge was the present Holmes, L.J., then Holmes, J. They were divided in their views—Holmes and Madden, JJ., being of opinion that the jurisdiction existed to direct and to effect a valid service outside of the county where the offence was committed; while Gibson, J., "after considerable fluctuation of opinion," came to an opposite conclusion. The judgments delivered in that case, going as they did to the very root of the question as to the Justices' jurisdiction, and tracing its development, have been of vast assistance to anyone who, like myself, approaches this particular matter for the first time. Furthermore, they relieve me from touching on a number of incidental topics, any reference to which would result in the

(1) 32 L. R. Ir. 542.

merest repetition. These judgments examined in detail the history of the procedure by summons, and dealt with what was conceived to be the practice as to service up to the passing of the Petty Sessions Act in 1851. I think it is fairly clear that, unless in cases of special statutory authority such as those referred to by my brethren who have already given judgment, Justices had no jurisdiction up to that period to issue summonses for service outside of their own county; and a text-book of considerable authority—Nun and Walsh's Justices of the Peace (cited by Mr. Ronan), published in 1844—confirms this view. At p. 164 the significant sentence occurs: "Some few statutes authorized service outside the limits of jurisdiction," the implication being that, except in the cases contemplated by such statutes, the jurisdiction to serve outside of the county did not exist. If I found that the jurisdiction existed before and up to 1851, I should be slow to restrict it unless I found clear and distinct language for doing so in the Petty Sessions Act. I am satisfied it did not exist, unless in the excepted cases I have mentioned, and therefore I will very shortly consider whether the latter Act extended the jurisdiction.

The foundation and source of the magistrate's authority is to be found in his commission, which confines that authority to the limits of the particular county for which he is appointed. The 7th section of the Petty Sessions Act (Ireland) is explicit in defining the powers of a Justice to act for and in different localities, and in doing so recognizes the fact that, *primâ facie*, the matters in respect of which he may act are only such as arise within his county. The English practice is governed by Jervis's Act, passed three years before the Petty Sessions Act, and, whatever may have been the practice in England as to service of summonses before that Act, it seems to be certain that—since its date—magistrates in that country consider they have jurisdiction to require the appearance of defendants residing in any other counties, and to act on summonses issued for that purpose. And this is not unreasonable when it is remembered that the jurisdiction to entertain cases is confined by Jervis's Act to the Justices of the county where the offence was committed or the cause of complaint arose. If the defendant's residence was outside of the latter county, he could not otherwise be made amenable by summons at all. With this Act

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in existence, and with, presumably, the recognized practice in England of acting on summonses no matter where served, the Irish Petty Sessions Act was passed three years later. It differs in two main respects from Jervis's Act, and these differences are not accidental, but, on the contrary, seem to be of a very deliberate character. By its 10th section it gives jurisdiction to the Justices of the county where a defendant *resides*, to entertain a case, although the matter of the complaint arose in another county—a jurisdiction not given to English magistrates—and, furthermore, in the concluding paragraph of the 11th section, it expressly extends the Justices' jurisdiction in regard to warrants and summonses when the defendant resides in an *adjoining* county. Why should it be necessary to superadd this jurisdiction if the Justices already had it? In *The Queen* v. *Justices of Cork* (1), Holmes, J., considered that the effect of the section was merely to enable an unbacked warrant to be executed in an adjoining county. I cannot think that the language of the paragraph permits of such limitation. It comprehends not alone warrants, but summonses, and to give it the construction suggested by Holmes, J., would entail a failure to give effect to that part of the sentence which puts a summons in the same category as a warrant. Indeed, the learned Judge evidently felt this himself, for he admits that his interpretation of the paragraph renders the previous mention of a summons surplusage. If possible, we must give effect to every word of the section. The reference to summonses was not an idle or unmeaning one, and it seems to me we can give a very intelligent and consistent construction to the paragraph by holding that it confers an additional jurisdiction to that which had been given by the preceding part of the Act, by providing that warrants and summonses are to run in an adjoining county just as if the defendant resided in the county of original jurisdiction. There is no such provision in the English Act, and I cannot think that such a special authority would be expressly conferred, unless it was considered by the framers of the Act that without it the jurisdiction would not exist. If the contention of the complainant in the present case were correct, there would be no

(1) 32 L. R. Ir. 542.

necessity for the express conferring of such an authority, for, according to that contention, the Justices had already a jurisdiction unlimited as to service for the whole of Ireland.

I have, therefore, arrived at the conclusion that unless in adjoining counties the jurisdiction as to service of summonses is confined to the county of original jurisdiction. This opinion is fortified by the 13th section of the Act, which is concerned with the summoning of witnesses, and by those subsequent sections which deal with the backing of warrants. The whole scheme of the Act discloses a radical difference between the Irish and the English statutes, and justifies, in my opinion, an interpretation of its clauses which, though opposed to the English practice, will be in harmony with those features which distinguish the Irish from the English jurisdiction.

WRIGHT, J.:—

The summons in the present case is brought under the 3 & 4 Vict. c. 97, section 16 (Regulation of Railways Act, 1840), and it raises a question of general importance—up to the present undecided—namely, can a summons in a criminal matter within the summary jurisdiction of a Justice be served in a county outside the county of the Justice issuing the summons, and not adjoining it.

This question came before this Court in the year 1893, in the case of *The Queen* v. *The Justices of Cork* (1), and in that case the Court was equally divided. The question in that case was complicated to a certain extent by the provisions of the local Acts; in the present case no such complication exists. Mr. FitzGibbon, as I understood his very able argument for the complainants, undertook to prove, first, that this extended jurisdiction of Justices existed before the Petty Sessions Act of 1851; and, secondly, that it had not been cut down, or confined, by the provisions of that Act. I may state shortly that, as to the first proposition, his argument did not carry conviction to me. It is contrary to the opinion expressed in a text-book of great and recognized authority, Messrs. Nun and Walsh (ed. 1844), p. 164, already cited, which

(1) 32 L. R. Ir. 542.

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may be taken to represent the opinion of Irish lawyers at that date. I find nothing in Montgomery's Levinge, or in Molloy, to suggest a contrary view, and in at least three statutes passed prior to 1851, already referred to, 5 Geo. 3, c. 10, section 1 (Burning of land), 6 & 7 Vict. c. 91, section 30 (Charitable Loan Fund Act), and the 12 & 13 Vict. c. 92 (Prevention of Cruelty to Animals Act), sections 14 and 15, power to serve the summons on the defendant personally, or to leave it at his residence outside the county in which the summons has been issued, is expressly given; and while I do not say that the express declaration in these three statutes of an extended jurisdiction is decisive on this part of the case, it certainly strongly supports the view that the general jurisdiction of the Justice, prior to 1851, was territorial, *i.e.* confined to the limits of his own county. Jervis's Act, 11 & 12 Vict. c. 43, was passed for England in the year 1848. It relates entirely to cases of summary jurisdiction, summary convictions and orders. Under it the jurisdiction of Justices in England to issue a summons for service outside their own or an adjoining county, in summary cases, is unquestioned in practice; it is so laid down in all the English text-books on the subject, and, if not decided, it is recognised, or at all events assumed, to be the law in two reported cases, *The Queen* v. *Lightfoot* (1) and *Berkely* v. *Thompson* (2), both cases under the Bastardy Acts; and in truth a careful examination of the different sections of the English Act would lead inevitably to this conclusion. On this matter I would only shortly refer to the judgment of Holmes, J. (at p. 566), in *The Queen* v. *The Justices of Cork* (3), in which the several sections of Jervis's Act are closely analysed, and this conclusion is in his judgment clearly shown to follow. The Irish Act, 14 & 15 Vict. c. 93, came three years later. It applies to indictable crimes and offences, as well as to cases, civil and criminal, of summary jurisdiction; and not merely in its scope, but in the framework and language of several of its sections, it differs materially from the English Act, and it is not, I think, a violent presumption to assume that this difference was not unintentional. As I have said, I am of opinion that the prosecutors' argument on the first

(1) 6 E. & B. 822. (2) 10 A. C. 45. (3) 32 L. R. Ir. 542.

branch, that prior to the Petty Sessions (Ireland) Act, 1851, the Justice's jurisdiction was not confined to his own or an adjoining county, fails; and I now proceed to consider what was his jurisdiction as declared by that statute.

By section 10 of the 14 & 15 Vict. c. 93, the Justices are empowered to receive information in all cases of crimes or offences, punishable upon indictment or upon a summary conviction, either (1) where the crime or offence has been committed, or is charged to have been committed, within the limits of the jurisdiction of the Justice; or (2) where the accused is resident within the limits of the jurisdiction of the Justice, but the crime or offence has been committed, or is charged to have been committed, elsewhere out of the jurisdiction of the Justice; the section further empowers the Justice to receive complaints, and make summary orders, as to other matters arising within the limits of his jurisdiction—words wide enough to include summary proceedings of a civil nature. In the case of indictable crimes and offences, where the procedure by information and warrant is adopted, it is clear that by means of the machinery provided by later sections of the Act, sections 26–30, the warrant can be made effective in any part of Ireland by backing it in accordance with the provisions of those sections. Within the county of the Justice issuing it no backing is required; outside the county it is ineffective, until backed by the Inspector-General, or one of the Deputy Inspectors-General of Constabulary. A warrant issued by a Justice in England, which, of course, *per se* has no validity or force in Ireland, acquires efficacy by being backed in the same way by the Inspector-General, or Deputy Inspector-General (under section 29). It is right to remember that the Inspector-General and the Deputy Inspectors-General of Constabulary are made by the Constabulary Act, 6 & 7 Wm. 4, c. 13, section 5, Justices of the Peace for every county, county of a city, &c., in Ireland, and the power of any one of them to act in all matters arising within a county, irrespective of where he may happen to be at the time, is expressly declared by section 7 (3) of the Petty Sessions Act of 1851.

The result is, that the warrant of a Justice is effective without any further act within his own county; it is of no effect in any

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other county until something further is done, *i.e.* backing by a person who in fact is a Justice for the other county, and who by this ministerial act, as I think it is, of backing it, practically turns it into a new warrant for that other county. Where, on the other hand, a summons is resorted to, which may or may not be followed by the issue of a warrant for the arrest of the defendant, I can find no trace in any part of the statute of any means by which it can be given efficacy outside the county of the Justice issuing it, to which presumably it is confined; there is no power to back a summons.

I now come to sub-section 2 of section 11, on the construction of which, taken with the other sections of the Petty Sessions Act, the decision of the question raised in the present case mainly depends. It must be conceded, and indeed has been conceded in the argument from the very commencement, that under the section a summons is something more than a mere notice; it is a process to compel appearance; it is so called in the form of the summons contained in the schedule to the Act, "Process to enforce appearance"—"This is to command you to appear," whether as a defendant or a witness—which schedule, by section 48, is made part of the Act; and by section 11 (2) in all cases of summary jurisdiction, upon proof of service of the summons, the Justices may proceed in the absence of the defendant, and may on his non-appearance issue a warrant for his arrest. The proviso towards the end of section 11 (2) deals with all cases of summary jurisdiction, civil and criminal, and refers to two classes of persons, party and witness. It has been suggested in the argument that the word "witness" got into the section by mistake; but I do not think that I am at liberty to get rid of it by the theory, convenient, though somewhat unscientific, that it got into the section by a blunder. The phrase "compel the appearance of party or witness" is not used elsewhere in the Act, which uses various forms of expression, *e.g.* "the manner in which persons shall be made to appear," "to compel appearance," and in the form in the schedule to the Act, "Process to enforce appearance," which seem to me to be only varying modes of expressing the same thing. This very phrase "compelling appearance" is to be found in sect. 1 of the Summary Jurisdiction Act, 14 & 15 Vict. c. 92, to which

my attention was directed by my brother Gibson—an Act passed on the same day as the Petty Sessions Act, and, like it, a consolidating and amending Act. This section was not brought to our notice by either party during the argument. Section 11 (2) undoubtedly includes civil cases. All considerations of convenience and common sense, and analogy to the statutory jurisdiction of the Civil Bill Court, are against the notion that, in a civil case to be heard and determined at Petty Sessions, a defendant in Donegal may be brought to Kerry to answer a demand for what must be a trifling amount, more particularly when it is borne in mind that the power of the Justices to indemnify him against costs is limited to 20*s*. I think the argument is equally strong against the existence of such a jurisdiction in petty criminal offences capable of being summarily adjudicated on. The proviso towards the end of the section is not only wide enough to include, but by its very terms expressly deals with, civil cases as well as criminal: "in every case where the *offence* shall have occurred or the *cause of complaint* shall have arisen"—words apt and proper to describe both classes of case, and according to ordinary rules of construction effect must be given to them if possible. It is certain that a warrant cannot be used to compel the physical attendance of a defendant in a civil case within the jurisdiction of the Justices. Section 13, in my opinion, throws a light on section 11 (2). Generally speaking, a witness whose attendance is to be enforced is a witness "within the jurisdiction of the Justice": see sect 13. This is the language of section 13, which recognises the territorial limits of the Justice's jurisdiction as being confined to his own county. This runs through the whole Act, subject to the extension given by section 7—an extension obviously given from considerations of convenience where the Justice is in an adjoining county; and I read the proviso towards the end of section 11 (2) as one necessarily referable to and embracing cases within the summary jurisdiction, civil as well as criminal, of the Justices, and as giving an efficacy to the summons in all cases as a mode of enforcing appearance, that is constructive appearance, upon the service of which on a defendant in an adjoining county, and on his non-appearance, the case against him may proceed in the same way as if he were served in the county of the Justice issuing

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the summons, and to the warrant, upon service on a witness in an adjoining county, in the same way as if he were served within the county of the Justice issuing the warrant; and in fact, as I read the concluding proviso of section 11 (2), for the sake of convenience the jurisdiction of the Justice is extended over the frontier of his own county and into the adjoining county, in all cases, civil and criminal, within his summary jurisdiction. I find nothing in the Act to warrant the doctrine contended for by the prosecutors, that a summons may be served efficaciously in any place throughout the length and breadth of Ireland; and the extension to the adjoining county in the proviso impliedly negatives such a contention.

Solicitor for the appellants: *Croker Barrington*.
Solicitor for the respondent: *Michael Dalton*.

J. G. T.

In the GOODS of THOMAS BERRY, Deceased (1).

K. B. Div. Probate. 1906. Dec. 21.

Practice—Administration—Grant limited to trust property—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 30—Devolution of real estate on death of trustee.

The Court granted letters of administration *de bonis non* to the goods of the surviving trustee of a deed, by which a rentcharge on real estate was put in settlement. The grant was limited to the appointment of a new trustee of the settlement, and to vesting the rentcharge in the new trustee. The personal assets of the deceased trustee had already been fully administered.

Motion.

This was an application on behalf of the Rev. Thomas Sterling Berry for an order that he be at liberty to apply for and obtain letters of administration *de bonis non* of Thomas Berry, deceased, limited to appointing a new trustee of a settlement, of which Thomas Berry had been the surviving trustee.

The settlement was dated February 2nd, 1828, and made between Sterling Berry of the one part and Francis Berry, Marlboro Parsons Berry, and Thomas Berry (thereinafter called the trustees), of the other part. After reciting that the said Sterling Berry was desirous of settling his property for the benefit of his children, and that he was seised (*inter alia*) of a perpetual rentcharge of £100, late Irish currency, payable out of the lands of Loughnagore and Skehanagh, in the county of Westmeath, the said perpetual rentcharge of £100 was conveyed to the said Francis Berry, Marlboro Parsons Berry, and Thomas Berry, their heirs, executors, and assigns; and it was by the said indenture declared that the said trustees, as soon as his second son Marlboro Sterling Berry should attain the age of twenty-one years, should convey the said rentcharge to such trustees as they, or the survivor of them, should nominate, and that they should give to him the said Marlboro Sterling Berry an estate for life, with remainder to his first and every other son in tail, with remainders over. Sterling Berry died

(1) Before Andrews, J.

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on February 2nd, 1888; Marlboro Sterling Berry attained the age of twenty-one years, and thereupon became beneficially entitled under the limitations in the said deed to the said rentcharge. He died on January 6th, 1890, whereupon his only son, Rev. Digby Marsh Berry, became entitled to the said rentcharge as tenant in tail in possession. Digby Marsh Berry had agreed to sell the rentcharge to F. W. Gardiner, of Warriston, Moffat. Digby Marsh Berry resided at Heidelberg, Melbourne, Australia, and had instructed Messrs. Baker & Ringwood, solicitors, to carry out the sale. Counsel acting for the said F. W. Gardiner had required that a trustee of the said deed of February 2nd, 1828, should be appointed to join in the conveyance of the said rentcharge.

Francis Berry died on October 31st, 1864; Marlboro Parsons Berry died on October 28th, 1842; Thomas Berry, the surviving trustee of the said deed, died on August 19th, 1882, and letters of administration intestate of his personal estate and assets were granted forth of the principal registry on November 21st, 1882, to the Rev. William Winslow Berry, his first cousin. Thomas Berry died a bachelor, without father, mother, brother, sister, grandparent, uncle, aunt, nephew, niece, or great-grand-parent him surviving. William Winslow Berry died on June 24th, 1891, having fully administered the personal estate of Thomas Berry, and probate of his will was on April 11th, 1891, granted to his executor and son Rev. Thomas Sterling Berry.

An affidavit setting out these facts was made by Sir Augustine Baker, of the firm of Baker & Ringwood, in support of the motion that the Rev. Thomas Sterling Berry should be at liberty to apply for a grant of administration limited to the appointment of a trustee of the said deed of settlement. It was proposed that the said Thomas Sterling Berry should, when the grant was issued, appoint Frank V. Gordon, solicitor, to act as such trustee. The affidavit stated that he consented to act, and was a fit and proper person to act, as such trustee, and had no interest adverse to the said Digby Marsh Berry.

T. Henry Maxwell, in support of the motion :—

The effect of section 30 of the Conveyancing and Law of Property Act, 1881, was to vest the rentcharge in the personal

representative of Thomas Berry, the surviving trustee, as if it was a chattel real vesting in him—that is to say, it is treated by the statute as personal estate, and being personal estate the Court has jurisdiction to make a grant in respect of it, which is necessary owing to the death of the personal representative of Thomas Berry, and should be limited to the appointment of the proposed new trustee and to the vesting of the rentcharge in him: *Goods of Jackson* (1); *Goods of Butson* (2); *In re Parker's Trusts* (3).

The following order was made:—

"IT is ordered by the Court that the said Reverend Canon Thomas Sterling Berry be at liberty to apply for a grant of letters of administration of the unadministered goods of the said Thomas Berry, deceased, the last surviving trustee of an indenture dated the 2nd day of February, 1828, and made between Sterling Berry of the one part, and Francis Berry, Marlboro Parsons Berry, and Thomas Berry, of the other part, limited to the appointment of Frank V. Gordon, solicitor, of Blackrock Lodge, Blackrock, in the county of Dublin, as a new trustee of the said indenture in lieu of the said Thomas Berry, deceased, and to the vesting in the said Frank V. Gordon, as such trustee, of the perpetual rentcharge of £100 late Irish currency in the said indenture mentioned, payable out of the lands of Loughnagore and Skehanagh, in the county of Westmeath."

Solicitors: *Baker & Ringwood.*

W. L.

(1) 7 L. R. Ir. 318. (2) 9 L. R. Ir. 21. (3) [1894] 1 Ch. 707.

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Nov. 14, 15, 21.
Appeal.
Dec. 10, 11, 17.

BRANDON & CO. *v.* HANNA (1).

(1905. No. 12,676.)

Principal and agent—Agent employed to sell house—Rescission of employment—Subsequent sale through third party—Right of agent to commission—Estoppel—Accord and satisfaction.

The plaintiffs were employed by the defendant to negotiate a sale of defendant's business, on the terms that they were to receive a commission if they found a purchaser, but that if no sale there was to be no charge. The plaintiffs advertised the business for sale, and, in October, 1904, introduced to the defendant one N. as a possible purchaser, who inspected the premises and stock, but made no offer. In February, 1905, defendant, with the approval of plaintiffs, decided not to sell. In May, 1905, plaintiffs claimed, and were subsequently paid, a small sum for their out-of-pocket expenses in them atter. In June, 1905, defendant consulted a friend C. as to the sale of the business. C. knew N., and knew he was looking out for a business of the kind, but did not know of his introduction to defendant by plaintiffs. He suggested N. to defendant as a likely purchaser, and subsequently communicated with N., advising him to purchase. N. inspected the premises and stock, and made an offer, and, after some negotiations between the defendant, N., and a third party, a price was fixed, at which N. bought the business. The plaintiffs having brought an action, claiming commission on the purchase-money, the jury found that the sale really and substantially proceeded from the plaintiffs' acts, and found for the plaintiffs for the amount of commission claimed:—

Held, by the King's Bench Division (Lord O'Brien, L.C.J., and Madden, J.; Wright, J., *diss.*), and by the Court of Appeal, that the verdict in favour of the plaintiffs could not be sustained on the evidence, and that verdict and judgment should be entered for the defendant.

MOTION on the part of the defendant that the verdict and judgment in favour of the plaintiffs be set aside, and that verdict and judgment be given and entered for the defendant, or in the alternative for a new trial, on the grounds that the verdict was against evidence, and the weight of evidence, and that the learned Judge

(1) In the King's Bench Division, before LORD O'BRIEN, L.C.J., and MADDEN and WRIGHT, JJ.

ought to have held in point of law that defendant on the evidence was entitled to judgment, and should have directed and entered same for defendant.

The action was brought to recover £88 16*s.* 3*d.* commission earned by plaintiffs in effecting a sale of defendant's premises. The commission was claimed at the rate of 2½ per cent. on a sum of £3552 10*s.*, the net proceeds of the sale. The defendant by her defence denied that the plaintiffs effected such sale, or were employed by her, and further pleaded that the employment (if any) by the defendant of the plaintiffs as agents to effect a sale was revoked or cancelled by defendant before plaintiffs had procured any person willing to purchase.

The action was tried before Kenny, J., with a common jury of the City of Dublin, on the 17th June, 1906, when the following matters were proved:—

The defendant, Mrs. Hanna, had a large drapery business in Newry, which she contemplated selling. The plaintiffs were a firm of accountants in Belfast, who were in the habit of preparing and auditing the defendant's accounts. In June, 1904, the defendant had a conversation with the plaintiffs' manager, a Mr. Boyd, as to the disposing of her business, and asked him what the plaintiffs' charge would be for carrying through a sale. He said he believed the usual rate was 5 per cent. It was arranged that if there was no sale there would be no charge. The terms of an advertisement for the sale of the business were then discussed, and such advertisement was, subsequently, inserted by the plaintiffs in the *Drapers' Record*. In October, 1904, Boyd introduced to defendant, as possible purchasers, two gentlemen named Newell, members of a firm of Newell, Bros., who inspected defendant's shop and stock, but made no offer, as defendant had not definitely decided to sell. Some communications subsequently passed between the defendant and Boyd, on the one hand, and Boyd and Newell, Bros., on the other, but nothing was definitely arranged. In February, 1905, Boyd had an interview with defendant, when, according to his evidence, "she said she thought she would not retire, and would not sell. Her returns were good, and her health was better. We practically arranged that she would not sell at all, but would continue her business." Defendant, in her evidence,

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stated that Boyd, on that occasion, said she had better go on with her place, as she was making money. After that nothing further was done by plaintiffs in relation to a sale.

On the 19th May, 1905, the plaintiffs furnished defendant with an account claiming £8 0*s.* 8*d.*, composed of two items, viz. :—(1), preparation of accounts for year ending 20th February, 1905, £7; (2), travelling expenses and cost of advertisement in *Drapers' Record*, £1 0*s.* 8*d.* Portion of these travelling expenses was claimed in connexion with the negotiations for the sale of the business. This account was paid by defendant on the 18th June.

On the 29th June defendant wrote to Boyd as follows :—"Your letter to hand. You are evidently under some misapprehension as to your charges this year. The account is exactly the same amount as you charged the previous year, when you had two years' accounts to go into (£8). As to the expenses of advertisement in *Drapers' Record*, you have been paid for it, and I fail to see how any expenses were incurred with the proposed sale of the business. You charge on your statement railway expenses and advertisement in *Drapers' Record*, £1 0*s.* 8*d.* The return first-class fare from Portadown to Newry is 5*s.* 10*d.* You were here twice, which would amount to 11*s.* 8*d.*, taking for granted that you came on my business only, which you did not; then a shilling for advertisement in *Drapers' Record* would be 12*s.* 8*d.*; so you can readily see overcharge in that item. I left the matter entirely in your hands, and made no arrangements, feeling that you would do what was right. I now see that I should have arranged terms, and again repeat that I consider you have charged me too much; however, it is a lesson to me not to allow anyone to transact business until I know the actual charge, and then I shall know what I really have to pay, and cannot grumble afterwards.—Sincerely yours, E. M. HANNA. Your remarks to me about the proposed sale were 'no sale no charge,' and, of course, as you are aware, the whole business in that respect did not result in a sale, and when last here you advised me to go on with the business, as it would pay the best."

Boyd, in reply, returned 5*s.*, portion of the charge in respect of the preparation of the accounts, but insisted on retaining, and did

retain, the items charged in respect of the expenses in relation to the proposed sale.

In June, 1905, defendant told a Mr. Carlisle, a commercial traveller, that she wanted to sell her business, as she had got into bad health, and asked him if he knew any person likely to buy. He mentioned Newell, Bros., who bought goods from him, and who, he knew, were looking for additional premises. Defendant told him that the Newells had been down already to look at the place. When Carlisle mentioned Newell, Bros., to defendant, he did not know that they had been previously looking after the place, or had been brought there by the plaintiffs. Carlisle subsequently saw one of the firm of Newell, Bros., and mentioned to him that defendant wanted to sell her business, and strongly advised him to purchase. The Messrs. Newell then came to defendant's premises, went over the stock, and made an offer. After some negotiations between Newell, Bros., the defendant, and a Mr. Newell, a bank manager, a price was fixed in October, 1905, at which the sale was carried out to Newell, Bros. The plaintiffs, on learning of the sale, made a claim against defendant for commission at the rate of $2\frac{1}{2}$ per cent. on the net purchase-money, and on the defendant denying her liability in this respect brought the present action.

At the close of the plaintiffs' case, Gordon, K.C., for the defendant, asked for a direction, which Kenny, J., refused. The requisition was repeated at the close of the case, and again refused. A discussion arose as to the form of the questions for the jury. Upon this point the report of Kenny, J., set out as follows:—"Both sides agree that the question should be in the same form as that put in *Wilkinson* v. *Martin* (1). Gordon, K.C., suggests some others, including one as to rescission, but withdraws suggestion on my saying that these matters will arise on the question agreed on, and on my statement to the jury of the law and facts."

The following were the questions left to the jury, with their answers thereto:—

1. "Did the sale really and substantially proceed from the plaintiffs' acts?" "Yes."

(1) 8 C. & P. 1.

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2. "If you answer the above question in the affirmative, what sum are the plaintiffs entitled to?" "Full amount claimed, £88 16s. 3d."

Kenny, J., gave judgment for the plaintiffs accordingly. He added that he would, if necessary, have amended the pleading by adding a claim for breach of contract in countermanding plaintiffs' authority, such as appeared in *Green* v. *Bartlett* (1). He stated that it was a case in which he thought the jury would have found for the defendant, and that, had he been trying the case without a jury, he would have done so.

Gordon, K.C. (with him *Harrison, K.C.*, and *Cusack*), for the defendant:—

There was no evidence to support the finding of the jury that the sale proceeded from the acts of the plaintiffs.

But even assuming that the sale did proceed from any act originally done by or on behalf of the plaintiffs, there was subsequently a rescission by mutual consent of the contract of employment, which prevents the plaintiffs from recovering. The claim made by the plaintiffs for the payment of their out-of-pocket expenses, and the payment of these by the defendant, being inconsistent with the original agreement of "no sale, no charge," amounted to a rescission of that agreement, and a revocation of the employment of the plaintiffs as agents to sell. To give rise to a claim for commission there must be a continuing contractual relationship between the parties: *Toulmin* v. *Millar* (2). *Wilkinson* v. *Martin* (3) and *Green* v. *Bartlett* (1), no doubt, decide that the principal cannot defeat the right of the agent to commission by determining the employment without the consent of the agent. But this principle does not apply to a case like the present, where the contract of employment is rescinded by mutual consent.

Magrath, K.C., and *Thomas Harrison* (with them *Serjeant Dodd*), for the plaintiffs:—

The jury have found that the sale really and substantially proceeded from the acts of the plaintiffs, and there was evidence

(1) 14 C. B. (N. S.) 681. (2) 58 L. T. (N. S.) 96. (3) 8 C. & P. 1.

to sustain this finding: *Mansell* v. *Clements* (1). This being so, the plaintiffs are entitled to commission, even though the sale was ultimately effected through the intervention of a third party: *Wilkinson* v. *Martin* (2); *Green* v. *Bartlett* (3).

The payment of the out-of-pocket expenses was a mere gratuity, and did not amount to an abandonment by the plaintiffs of all their rights under the original contract. In any event, this was a question for the jury.

[LORD O'BRIEN, L.C.J.: Might it not be contended that the acceptance by the plaintiffs of these expenses operated as an estoppel by conduct, precluding them from afterwards claiming commission?]

To amount to an estoppel by conduct, it must be shown that one person has by his words or conduct wilfully caused another to believe the existence of a certain state of things and to act on that belief so as to alter his own previous position: *Pickard* v. *Sears* (4). There is nothing amounting to this in the present case. The conduct of the plaintiffs was not relied on by way of estoppel either in the pleadings or at the trial.

Harrison, K.C., in reply, referred to *Freeman* v. *Cooke* (5); *Carr* v. *London and North-Western Railway Co.* (6).

Cur. adv. vult.

Nov. 21.

WRIGHT, J.:—

This was an action to recover £88 16*s.* 3*d.*, commission at 2½ per cent., claimed by the plaintiffs to have been earned on the sale of defendant's shop and stock.

The general facts of the case are not in dispute, and the jury found in favour of plaintiffs for the full amount. It is undoubted that defendant employed the plaintiffs as early as June, 1904, to find a purchaser for her, and on the terms of paying commission if a sale was effected, and that if there was no sale there would be no charge. Plaintiffs introduced Messrs. Newell, who ultimately became the purchasers, to defen-

(1) L. R. 9 C. P. 139.
(2) 8 C. & P. 1.
(3) 14 C. B. (N. S.) 681.
(4) 6 A. & E. 469, at p. 474.
(5) 2 Ex. 654.
(6) L. R. 10 C. P. 307.

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dant, and plaintiffs' manager, Mr. Boyd, and Mr. James Newell together inspected defendant's shop and stock in October, 1904. A good many letters passed between the parties, defendant and Boyd acting for plaintiffs. In February, 1905, defendant seemed undecided about selling, and in May, 1905, told Boyd that she had decided not to sell. Shortly afterwards plaintiffs sent in an account to defendant on 19th May, amounting to £8 0*s.* 8*d.*, made up of charges for preparing accounts, which are not relevant, and of a sum of £1 0*s.* 8*d.* for travelling expenses and cost of advertisement in *Drapers' Record*. This amount was paid by defendant on the 18th June. It is quite clear that defendant was under no liability to plaintiffs for this claim, and she shows clearly by her letter of the 29th June that she was well aware of this. [His Lordship read the letter, set out *ante*, p. 214.]

From this date nothing further was done by plaintiffs in reference to a sale, which they, in all probability, believed to be finally abandoned. In or about the same time, certainly in the summer of 1905, defendant again determined to sell, and with the assistance of a Mr. Carlisle, a commercial traveller, with whom she had business dealings, and a Mr. Newell, banker, in Newry, she sold in September or October, 1905, to Messrs. Newell, the same firm who had been introduced to her by plaintiffs, for the sum of £3552 10*s.*, and immediately plaintiffs made their claim for commission, which defendant at once repudiated.

The evidence is set out in the report of the learned Judge. As I have said, although there is little or no controversy as to the facts, there is, or may be, much difficulty and diversity of opinion as to the inference to be drawn from them. Mr. Gordon, K.C., for defendant, asked the learned Judge to direct a verdict for defendant—a request which was not complied with—and then, as the learned Judge reports, a discussion ensued as to the form of the questions for the jury, but both sides agreed that the question should be in the same form as in *Wilkinson* v. *Martin* (1), which question, it was understood, was to include, as involved in it, the question of rescission of the contract. The jury have found that the sale really and substantially proceeded from the

(1) 8 C. & P. 1.

plaintiffs' acts, and have awarded them the full amount claimed, £88 16*s.* 3*d.* The verdict has been impeached as being against evidence, and the weight of evidence, and defendant contends before us, as at the trial, that on the facts proved she was entitled to judgment.

The law in cases of this kind has been considered and discussed in several reported cases, and may be taken to be well settled. I think it necessary to refer only and very shortly to two of them: *Wilkinson* v. *Martin* (1) and *Green* v. *Bartlett* (2). The first of these cases seems to establish that the broker is, or may be found to be, entitled to his commission, if he was, up to a certain time, the agent or middleman between the parties, although the contract was afterwards completed without his instrumentality or interference; and the later case, *Green* v. *Bartlett* (2), decides that he is, or may be found to be, entitled to his commission, even though before the actual sale the vendor withdrew the property from sale by him. In the latter case it was a term of the written agreement between the parties that in the event of the auction proving abortive, as was the case, the auctioneer was to get £25 out-of-pocket expenses.

Here the jury have found that the sale substantially resulted from the broker's efforts; and it must be taken from the learned Judge's report that they have also found that the contract between the parties was not rescinded—that contract being that in the event of a sale resulting from the plaintiffs' acts the defendant would pay him commission at an agreed or, if not agreed, at a reasonable rate.

But for the claim made by plaintiffs for £1 0*s.* 8*d.*, travelling expenses and advertisement in connexion with the then attempted, but not then effected, sale of this house, and the payment by defendant and acceptance by plaintiff of that amount, I would hold without any difficulty that there was evidence, and ample evidence, to justify the jury in finding for plaintiffs. But this piece of evidence is one which is peculiar to the present case, and on the facts distinguishes it from all the reported cases. What was the effect upon the rights of the parties of this transac-

(1) 8 C. & P. 1. (2) 14 C. B. (N. S.) 681.

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tion, trivial as to amount, but carrying, it is contended, serious consequences? In the end the argument was reduced to this—What was the effect in law of this transaction on the rights of the parties when a sale subsequently ensued?

It has been presented in several aspects on the part of the defendant. In the pleadings and at the trial it was relied on as evidence of rescission—that was the only view then presented. The jury by their finding have negatived that, and, in my opinion, their finding on this ground cannot be disturbed. In the argument addressed to us it has been very persuasively put that this piece of evidence is coercive, that plaintiffs accepted this sum of £1 in full discharge of all his claims under the contract—which is rather in the nature of accord and satisfaction. There is much to be said, and much has been said, in support of that view, but it is open to two objections; it should have been raised by pleading, and, apart from this, it should have gone to, and been found by, the jury.

Thirdly, it is urged that this transaction amounts to an estoppel by matter *in pais*. This point is not raised by the pleadings. That a defence of this kind should be raised by the statement of defence under the Judicature Act and Rules is the opinion of the learned editors of Smith's Leading Cases (*vide* notes to *Duchess of Kingston's Case* (1)), and it seems reasonably clear that it should be pleaded under Gen. Ord. XIX., R. 16. It was not made at the trial: the report of the learned Judge puts that beyond all doubt; it was not made in the argument before us by counsel for the defendant; it was only after the argument had proceeded for a considerable time that the point was made by my Lord Chief Justice. The point, it will therefore be seen, is made somewhat late in the day; it had escaped the vigilance of the three trained and practised lawyers who appeared as counsel for the defendant, and who had occasion more than once to consider the facts and the legal inference from them; at every stage of the case it had passed unnoticed until it was discovered in Court by my Lord, albeit now relied on as an absolute bar to the action.

The argument is, that once plaintiffs' claim for this sum, how-

(1) 2 Sm. L. C., 11th ed., at p. 831.

ever small, was made and acceded to, and payment accepted by them, they cannot be heard to say that the contract was still subsisting, so as to entitle them to claim under it. The cases of *Pickard* v. *Sears* (1); *Freeman* v. *Cooke* (2); *Carr* v. *London and North-Western Railway Co.* (3) were cited to us; and with the principles enunciated in those cases we are all familiar.

I do not wish to contravene any single proposition laid down in any one of these well-known cases; neither am I for extending the doctrine of estoppel by matter *in pais*.

I go back to this one transaction. Plaintiffs had made a contract with defendant, under which, if a sale ensued from their efforts, they would be entitled to a commission. Defendant changed her mind about selling; said she would not sell, that her health was better, &c. Plaintiffs sent in a bill, and claimed £1 for out-of-pocket expenses—obviously, I would think, suggesting that as it was through no fault of theirs that there had been no sale, they should get this small amount—a view which commended itself to the defendant. Nothing, I would think, was further from the minds of either of the contracting parties than the intention on the one side of giving up rights, on the other side of extinguishing liabilities, under the contract. No assertion was made by the plaintiffs false in fact, and the defendant well knew her legal rights. If I were at liberty to speculate as to the meaning of the transaction, I would say it meant or may have meant this—for I have before my mind all through that the facts were for the jury—you, the vendor, have told me you do not now mean to sell; under the circumstances you ought to repay me the small amount I am out of pocket. That view defendant accepted. Probably neither of them had present to his or her mind the probable event of the defendant again changing her mind and selling, and that in that event plaintiffs' chance of earning a commission might revive. But however I may speculate, whatever view I may take of this transaction, I cannot say that it is so plain and unequivocal that the case ought then and there to be withdrawn from the jury; it was for the jury to say what was the meaning of it; they have said that, notwithstanding it, the contract was not

(1) 6 A. & E. 469. (2) 2 Ex. 654. (3) L. R. 10 C. P. 307.

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rescinded; it was for them to say, if they had been asked, was the claim made, and was the money paid under circumstances which showed that the contract was for any reason no longer subsisting. That was the province of the jury. It is not for us to say that the transaction is so clear and unmistakable that the plaintiffs by accepting this benefit cannot be listened to; cannot be allowed to say that the contract between them and the defendant is still open, so as to enable them to sue on it. No case that has been cited on the doctrine of estoppel comes within measurable distance of bearing out this contention.

I am, therefore, of opinion that this answer to the plaintiffs' case fails—that the case was for the jury, and that their verdict cannot be disturbed.

MADDEN, J.:—

The plaintiffs' case rests on contract, and it was necessary for them to prove an employment as agents on the terms of the alleged contract, and this contract of employment must continue up to the time when a purchaser was found. The plaintiffs have proved the existence at one time of a contract under which, if it had remained in force, they would have been entitled to the stipulated commission, although the actual sale to the purchaser was not effected by them. For the jury have found, and their verdict on this point cannot be disturbed, that the sale was, in fact, brought about by the act of the plaintiffs, and as a result of their introduction. Under these circumstances an agent is entitled to commission, even where the principal informed him that he did not intend to sell, and had himself privately negotiated the sale to a purchaser, who had been attracted by the agent's advertisements: *Green* v. *Bartlett* (1).

The case of *Toulmin* v. *Millar* (2), before the House of Lords, is reported in the Law Times Reports. A passage in the judgment of Lord Watson, as reported in the Law Times, is such a clear statement of the law as applicable to the present case, that I shall quote it from that report:—"If A" [the agent] "had no employment to sell, express or implied, he could have no claim to be remunerated. If he was generally employed to sell, and

(1) 14 C. B. (N. S.) 681. (2) 58 L. T. (N. S.) 96; 12 A. C. 746.

thereafter gave an introduction which resulted in a sale, he must be held to have earned his commission, although he did not make the contract of sale, or adjust its terms; because, in that case, he had implemented his contract by giving the introduction, and his employer could not defeat his claim to commission by determining his employment before the sale was effected."

The test, therefore, is—Was there, when the sale was effected, a continued employment of the plaintiffs as agents for the purpose of the sale? On the plaintiffs' own case, I am of opinion that there was not such a relation, and I think that Mr. Gordon was entitled to the direction for which he applied at the conclusion of the evidence given on behalf of the plaintiffs.

I agree with my brother Wright as regards a great deal of his judgment. I think that the present case could not be distinguished from those to which he has referred (more particularly from *Green* v. *Bartlett*) (1), were it not for the circumstances connected with the payment to the plaintiffs of the sum of £1 0*s*. 8*d*. I am also of opinion that the defendant cannot succeed on a defence founded either on accord or satisfaction, or on estoppel, neither of which defences was relied on in the progress of the case. I wish to make it clear that my judgment rests solely on the ground of discharge or rescission of the original contract resulting from the concluding of an inconsistent agreement.

The effect upon an existing contract of a subsequent inconsistent agreement concluded between the parties before breach has been differently described as operating by way of rescission (Leake on Contracts, p. 561), and of release (Chitty on Contracts, 647), and of discharge (Addison on Contracts, 164). But however it is described, the effect is to put an end to and discharge the existing contract. In the present case the original contract proved by the plaintiffs, and admitted by the defendant, was a continuing employment as agents, on the terms that they were to be paid by commission, only in the event of a sale. The contract is thus described by Mr. Boyd:—"It was arranged between us that if there was no sale there would be no charge." The defendant

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says:—"He" (Mr. Boyd) "said if there was no sale there would be no charge." There is thus no doubt as to the terms of the original contract.

Subsequently, and while as yet there had been no sale, the plaintiffs sent in to the defendant a demand, based on an account which would be only sustainable if a contract had been entered into of an entirely different character, that is to say, a contract under which the agent was to be paid his expenses out of pocket in the event of no sale. The amount claimed was paid by the defendant. The result would be more startling if the expenditure of the agent, under a contract of this kind, in advertising and other matters, had amounted to hundreds of pounds, instead of to the small sum of one pound and eight pence. But the legal result is the same in both cases, in the absence of evidence displacing the inference resulting from the fact of the conclusion before breach of a contract inconsistent with that sued on by the plaintiffs.

The new contract, in order to operate by way of discharge, must be entered into with intent to dissolve the existing engagement. We are familiar with this principle in cases of novation. The jury, by their finding in this case, must, I think, be taken as having negatived such an intention. The question of discharge or rescission appears to have been presented to the jury by the learned Judge, with the assent of both sides, in connexion with the question which he put to them. Having regard to the report of the learned Judge, I read the verdict of the jury as a finding that the sale was in fact brought about by the plaintiffs, and that in so doing they were acting under the original contract. The question for us is whether that verdict can stand.

It appears to me that in the present case an intention on the part of both plaintiffs and defendant to treat the original contract as dissolved is a legal inference from the admitted facts of the case. There is no suggestion that the sum of £1 0*s.* 8*d.* was an offering voluntarily made by the defendant, and accepted by the plaintiffs, without prejudice to their rights under their original contract. It was demanded as of right, and reluctantly paid by the defendant. It can hardly be denied that a contract to pay expenses out of pocket in the event of no sale is inconsistent with

one under which there is to be no payment in the same event. There is no evidence suggesting that the parties entered into, or acted under, the substituted contract with the intention of keeping the rights under the former contract intact. In the absence of such evidence, I cannot see that there was any question for the jury, the inconsistency of the two contracts being plain to demonstration. I am, therefore, of opinion that judgment should be entered for the defendant, with costs.

Lord O'Brien, L.C.J.:—

I agree with my brother Madden. He has dealt fully with the effect of setting up an inconsistent agreement. I adopt everything he said with reference to putting forward an inconsistent agreement; but, perhaps, as there is a difference of opinion between the members of the Court, I may say a few words.

What was the question in the case? Whether the sale was really and substantially effected by the agency of the plaintiff—not whether he was the first to introduce the purchaser; but whether he had really and substantially brought about the sale. All the facts of the case, especially the admitted acts of Mr. Boyd, and the correspondence, show that the sale was neither effected through him, nor was consequent on anything he did. I do not think there is any evidence in the case to justify a verdict for the plaintiff. But, in my opinion, once he made the claim that he did (he demanded payment as a right in a document that was clearly intended to close the relations between the parties, and insisted upon payment as a right), and took the money he demanded, he severed himself from all relation with the defendant in reference to the premises. He took the money, and went his way. He cannot be allowed, having made the claim which he did make, and having taken the money and kept it, to put the defendant in a worse position than the contract between the parties justified.

I am afraid I cannot claim credit for any real discovery. I may have during the argument suggested a name. Mr. Gordon asked for a direction on the whole case, and he should have got it upon any ground upon which he was entitled to it. For my own part, I think it safer to take the opinion of the jury in almost

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every case, so as to prevent the necessity for a new trial if the Court *in banc* should think I was wrong in directing. If the plaintiff got the £1—I care not how small the sum—on the basis that the business was at an end, that his employment was at an end, he cannot be permitted to say it still subsists. Call it what you will—estoppel, as I believe I first suggested, or discharge or rescission, as my brother Madden prefers, or conclusive evidence of election to abandon—the fact always remains that he insisted on payment of the money, and got it, and it is idle to say that it was not paid through his insistence. He formally claimed it in a written document, and insisted upon it as a matter of right, and most certainly it does not lie in his mouth to say it was a mere gratuity. It was claimed as a right in the most formal way, and although Mrs. Hanna had some doubts as to whether he was entitled to it as of right, it was paid through his insistence that he was entitled to it as of right. It does not lie in his mouth to say he made his claim dishonestly. To me it appears wholly unsustainable to say it was dealt with by him as a mere gratuity. The account sent in was a closing account—to close the relations between the parties, to close all contractual relations between the parties. The contention that, so to speak, a dormant contract still existed, to be restored to a condition of wakefulness when a purchase took place, appears to me wholly unsustainable.

Putting another instance, I asked Mr. Magrath, supposing he got, say, instead of one pound, £150, and that after he got the £150 he made a claim for, say, £1000, for commission on the sale of a house without any fresh intervention by him, could it with any show of reason be argued that he could keep the £150 and get the £1000, once he demanded and got the £150? In that case, by giving a false complexion to his contract, he would get more than his actual contract entitled him to. He would get expenses as well as commission. I deliberately used the expression "without any fresh intervention by him." In this case, after he took the money there was no fresh intervention by him. But, assuming that the payment of the money was the giving of a gratuity, was not the meaning of the thing this:—that the one asked for, and the other gave, on the basis that the matter, the relations between them, being in every way at an end, the plaintiff might, at least,

get his out-of-pocket expenses—that the plaintiff had a moral claim, all, as it were, being over? No doubt, he first introduced the person who ultimately purchased; but the purchase, as distinguished from the introduction, was plainly not effected by him. To refer to an expression used during the argument, he was "out of it." In any event, were it necessary to examine all the evidence, I do not think that any twelve men could reasonably find that he was "in it." Looking at the evidence as a whole, I think it is clear that the purchase was not brought about by his agency, but by the efforts of others; and I do not think any twelve fair-minded men could reasonably find the contrary. I care not what the pleadings were. Lord Esher said he would always consider the pleadings as amended in any way that was necessary to give effect to the established or admitted facts. My brother Kenny, the Judge at the trial, was very clearly of opinion that the defendant should have got a verdict; but *ex abundanti cautelâ*, he let the case go to the jury. I am glad that we are not prevented by any legal barrier from giving effect to his opinion on the merits.

J. G. T.

Appeal. Dec. 10, 11, 17.

The plaintiffs appealed (1).

Serjeant Dodd, *J. M. Whitaker*, and *T. Harrison*, for the appellants.

Gordon, *K.C.*, *Harrison*, *K.C.*, and *Cusack*, for the respondent.

Dec. 17.

SIR SAMUEL WALKER, C.:—

This was an action for commission on a sale of the defendant's business, which the plaintiff alleged he had procured within the meaning of his contract with the defendant, so as to entitle him to the commission, though in point of fact it was carried out through another person named Carlisle. As Kenny, J., offered to allow the pleadings to be amended by adding a claim for breach of the contract of employment, the case may be treated as one

(1) In the Court of Appeal, before SIR SAMUEL WALKER, C., and FITZGIBBON and HOLMES, L.JJ.

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involving the right of the plaintiff to commission on any ground he could put forward.

The plaintiff was represented in the transaction by his manager, Boyd, whose acts and correspondence may be treated as those of the plaintiff.

Mrs. Hanna, the defendant, had a drapery business in Newry, which in June, 1904, she contemplated selling. The plaintiff's firm were in the habit of auditing her accounts yearly, and in that month she had a conversation with Boyd. She asked him what would be the charge for carrying the sale through, and in result an agreement was made that the firm should be employed to procure a purchaser at a commission of 5 per cent., but if there was no sale there should be no charge. Boyd, in October, 1904, introduced to her three gentlemen named Newell as possible purchasers. No terms of purchase were arranged or price stated, but they inspected the place and stock-in-trade. In November, 1904, she wrote to Boyd that she would go on with the business until after stock-taking in February.

In February, 1905, Boyd was engaged in preparing her annual accounts, and in that month, on Boyd's advice, she told him she would not retire, but would carry on her business, as her health was better and her returns good, and this was arranged, and Boyd understood and believed that a sale was off, and she continued to carry on her business.

On the 19th May, 1905, the plaintiff, through Boyd, furnished her with an account of his firm's charges for preparing her accounts for the year ending February, 1905, and he added a separate charge for "travelling expenses and cost of advertisement in *Drapers' Record*, £1."

Mrs. Hanna paid this charge. She, however, found fault with his scale of charges, and she added a postscript to her letter of 29th June—"Your remarks to me about the proposed sale were 'no sale no charge,' and, of course, you are aware the whole business in that respect did not result in a sale, and when last here you advised me to go on with the business, as it would pay the best." The plaintiff, however, was paid, and retained the amount claimed, less a small sum of 5*s.* remitted, and he has not given credit for it.

In July, 1905, a Mr. Carlisle, who did business both with the defendant and the Newells, ascertained that the defendant was willing to sell, and he mentioned the matter to the Newells; and she told him the Newells had been already looking at the place, and they were willing to buy, as they had been in October, 1904. He swore he did not know the Newells had been after it when he first mentioned it. In October, 1905, the transaction was closed with the Newells, and in the same month the plaintiff claimed £88 16*s.* 3*d.*, as the commission on the purchase-money, and the present action was brought.

There was no dispute as to the facts at the trial. At the close of the plaintiff's case Mr. Gordon for the defendant asked for a direction, which Kenny, J., refused, and this requisition for a direction was repeated at the close of the case. A question to the jury as to rescission of the contract was suggested, but both sides agreed that if there was to be a question for the jury it should be—"Did the sale really and substantially proceed from the plaintiff's acts?" and the jury found this for the plaintiff. Kenny, J., reports that he thought the jury would have found for the defendant, and that he would have done so if he had tried the case without a jury.

The case was argued in the King's Bench Division on a motion to enter a verdict for the defendant, or for a new trial, and the Court (Wright, J., dissenting) entered judgment for the defendant.

The question which has been argued before us is whether there was any evidence fit to be submitted to the jury in support of the finding on the question left to them.

There are numerous cases in which a party has been employed to procure a purchaser on the terms of being paid a commission, and has been held entitled to receive this commission if a sale had been effected, where a jury has found, on evidence fit to be submitted to them, that the sale was really brought about by his act, *e.g.* by the purchaser being attracted by his exertions, or having been originally introduced by him, though before the actual sale was carried out the defendant revoked the authority of the broker, and actually sold himself privately, or through another agent. *Wilkinson* v. *Martin* (1) and *Green* v. *Bartlett* (2) may be referred to as examples, and in such cases a question will arise for a jury

(1) 8 C. & P. 1. (2) 14 C. B. (N. S.) 681.

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which may be aptly framed as it was in the present case. But there is no case in which a plaintiff has succeeded in obtaining commission, or having a question submitted to a jury, where circumstances existed like those in the present case.

The position of the plaintiff towards the defendant is, I think, important. He was her annual auditor, and not an outside broker, and he himself through Boyd advised defendant in February, 1905, not to sell, and the defendant determined not to sell accordingly, and both parties understood that there was to be no sale. The relation between them of commission agent and principal altogether ceased; but in the present instance an element exists which is much stronger than the mere interruption of that relation, and which has a double force, both as to whether the contractual relation had ceased, and also whether there was an accord and satisfaction between the parties, which absolutely terminated the relation legally as if it had never existed. Here the plaintiff was not, under his contract, entitled to be recouped for his expenses; but in May, 1905, on the assumption that the whole relation was at an end, he made a claim for reimbursement and was paid it, and still retains it, and does not even give credit for it against his commission; and I think after that he is precluded from alleging that he could be a broker for any future sale. The relation was entirely broken by mutual understanding, and for valuable consideration, the receipt and retention of which are inconsistent with his claim.

On this ground, as well as for the other reasons stated in the judgment of the Lord Chief Justice, both of which I adopt, I think the verdict was rightly entered for the defendant by the King's Bench Division, and that the appeal should be dismissed with costs.

FITZGIBBON, L.J.:—

I concur with the Lord Chancellor. In my opinion the real question in the case is whether, at the time of the resumption, on Carlisle's intervention, of the negotiations for a sale there was any still continuing contractual relation between the plaintiff and the defendant, on which liability to pay commission could arise in the event of a subsequent sale. On that question it appears to me

that the prior transaction of the payment made by the defendant and accepted by the plaintiff, which I regard as a stated and settled account between them, if not conclusive as an accord and satisfaction, is clear proof of a mutual intention to settle all outstanding claims, and consequently of the determination of any contractual relation in respect of the previous negotiations, which both parties then believed to be at an end, because the intention to sell had been then abandoned by the defendant, on the advice of the plaintiff's agent, Boyd.

The work done towards the sale was one item of the business done by the plaintiff for the defendant, and the other was the work done in making out her accounts. Both these items were the subject of discussion before the account was settled by the payment of a sum of money, which, though small, would not have been payable if commission then was or could thereafter become chargeable. That is the strongest evidence of the end of any contractual relation in respect of a sale of the premises, and of a termination of the defendant's liability for commission. If this action were maintainable now, it must equally have been held maintainable, if those with whom the plaintiff had broken off negotiations when the defendant determined not to sell, had become purchasers at any future time, on her changing her mind for any cause.

HOLMES, L.J.:—

In this case there is no controversy on material matters of fact. The defendant carried on a large drapery business in Newry; and the plaintiffs, through their representative, Mr. Boyd, were employed to audit and adjust her accounts. In June, 1904, she was thinking of retiring, and she asked Mr. Boyd what his firm would charge for procuring a purchaser of the business and carrying out a sale. He replied that their payment would be by a certain percentage on the price, and it was distinctly agreed that if there was no sale there would be no charge. In the following October Mr Boyd informed the defendant that a firm called Newell Brothers might possibly purchase, and he brought one of them to Newry to see the stock and premises. Nothing definite came of this visit, inasmuch as Mrs. Hanna had not finally resolved to sell, and the Messrs. Newell, though disposed to

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negotiate, would not make an offer while the matter was in this uncertain state. Between this time and February, 1905, some communications passed between Mrs. Hanna and Boyd, on the one hand, and Boyd and the Newells, on the other; but no further progress was made in consequence of Mrs. Hanna's mind being still in doubt. In February, Boyd went to Newry to audit the defendant's accounts; and while he was there, she, apparently at his suggestion, determined not to sell, but to continue her business. Her returns, as Boyd said, had been good, and her health was better. Hence her determination not to retire; and from that date no more was done by the plaintiffs in relation to a sale. On the 19th May, Boyd sent an account of his fees for the audit amounting to £7, and "travelling expenses and cost of advertisement in *Drapers' Record* £1." This sum was paid by cheque on the 18th June, but some days later Mrs. Hanna objected to certain items in the account. She questioned both the sum charged for the audit, and the expenses incurred in connexion with the proposed sale of the premises, quoting Mr. Boyd's words "No sale, no charge," and adding—"You are aware the whole business in that respect did not result in a sale, and when last here you advised me to go on with the business, as it would pay the best." One or two other letters followed, and in the end Mr. Boyd returned five shillings that had been charged for an assistant's time in connexion with the accounts; but the items relating to the proposed sale were still insisted on, and no further objection was made thereto. It was assumed during the argument that these last-mentioned items amounted to £1 or to £1 0*s.* 8*d.*; but I think that this is a mistake which, although immaterial, I should like to correct. The sum charged for travelling expenses includes journeys unconnected with the proposed sale; but it also includes the cost of Boyd's journey in company with Newell, and of the advertisement.

Shortly after the settlement of this account the defendant said to a Mr. Carlisle, a commercial traveller with whom she had dealings, that she wanted to sell her business, as she had got into bad health, and asked him did he know any person likely to buy. The Messrs. Newell were customers of his, and, knowing that they were looking for additional premises, he

mentioned their name to Mrs. Hanna, and seeing one of the firm soon afterwards, he told him that the defendant wanted to sell her business, and strongly advised him to purchase it. In consequence of this, two of the Newells went to Newry and examined the stock and premises. Negotiations between them and the defendant followed, and, at length, with the help of a bank manager, a price was fixed at which the sale was carried out. Kenny, J., reports that if he had been trying the case himself he would have found for the defendant; but being of opinion that there was evidence from which it might be inferred that the sale really and substantially proceeded from the plaintiffs' acts, he left this question to the jury, who answered it in the affirmative.

In every case where an agent employed to sell sues for commission on the purchase-money, he must, before he can succeed, establish that the sale was brought about by him. The mere introduction of the person who ultimately becomes the purchaser is not enough, unless it appears that the introduction has led to the purchase. The Judge's question was therefore necessary if there was evidence to support it; but I am of opinion that so far from this being the case, the admitted facts show clearly that what was done by the plaintiffs had no connexion, direct or indirect, with the sale, and that therefore there was no evidence to support the finding. The introduction by Boyd of Newell was wholly fruitless. No negotiations followed; and all hope of its leading to a sale was put an end to in February when the defendant, on Boyd's recommendation, resolved to continue the business. After that date the plaintiffs took no further step; and the inclusion in their accounts of their expenses theretofore incurred shows that they regarded their contract with the defendant as no longer in existence. The actual sale originated in a casual conversation with Mr. Carlisle when he was seeing Mrs. Hanna on other business.

Carlisle had not heard of any previous intention on her part to sell, of the employment of the plaintiffs, or of the communications with the Newells. From their being customers of his, he had become aware that they were looking for additional premises, and this led him to mention their name to the defendant. She then said that they had been down already to look at the place,

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and this may have suggested to Carlisle that something relating to a sale had already passed between them; but it was certainly not this that caused him to speak to Mr. Newell and to advise him strongly to purchase. It is impossible, consistently with our ordinary conception of cause and effect, to hold that there is any evidence that the sale resulted from the plaintiffs' acts, and, therefore I am of opinion that the case ought to have been withdrawn from the jury and a verdict directed for the defendant. I understand that this was the chief ground of the judgment of the Lord Chief Justice.

Madden, J., rested his decision upon the plaintiffs' demand for the expenses connected with their attempt to sell and the payment of these expenses by the defendant. While I do not differ from him on this point, I would hesitate to accept his view without further consideration. If there were evidence on which the jury could have found for the plaintiffs on the question left to them, I am not sure that what occurred in May or June would have deprived the plaintiffs of their commission, less by the small sum already received for expenses. I, however, offer no final opinion on this point.

Solicitor for the plaintiffs: *Frank Kerr.*
Solicitor for the defendant: *R. L. Mullan.*

R. D. M.

O'DRISCOLL *v.* BANDON TOWN COMMISSIONERS (1).

Appeal. 1907. Feb. 15.

Practice—Equitable execution—Application by judgment creditor to be appointed receiver over debts due to judgment debtors—Town Commissioners—Debenture-holders.

The defendants were Town Commissioners of Bandon. The predecessors of defendants, purporting to act under the Lighting of Towns (Ireland) Act, 1828, built gasworks, and for that purpose leased certain premises, and raised the money by the issue of debentures secured on the gasworks and income arising therefrom, in respect of which £1900 was still due for principal, and one year's interest at 6 per cent. The plaintiff having recovered judgment for £181, applied to be appointed receiver by way of equitable execution over sums due by inhabitants of the town for gas supplied by the defendants. There was no property capable of being seized under an execution, and the statutory rate of 1*s.* in the £ was insufficient to defray the statutory obligations of the defendants:—

Held, affirming the decision of the King's Bench Division (Andrews and Wright, JJ.), that as the money in the receiver's hands would be liable to satisfy claims paramount to the plaintiff's debt, the application should be refused.

APPEAL by the plaintiff from an order of the King's Bench Division, dated the 6th February, 1907, by which an order obtained by the plaintiff *ex parte* from Johnson, J., dated the 13th December, 1906, appointing the plaintiff receiver by way of equitable execution over certain debts due to the defendants as managers of the gasworks at Bandon, was discharged.

On the 3rd March, 1902, the plaintiff recovered judgment against the defendants for £170 9*s.* 7*d.* and £10 14*s.* 3*d.* for costs, making together £181 3*s.* 10*d.* On the 17th September, 1902, a sum of £10 was paid to the plaintiff, but no further payment was made, and there was due to the plaintiff for principal, interest, and costs of registering the judgment as a mortgage, £209 10*s.* 11*d.*

(1) Before SIR SAMUEL WALKER, C., PALLES, C.B., and HOLMES, L.JJ.

Appeal. 1907. O'Driscoll *v.* Bandon Town Commrs.

The defendants were originally constituted, under the Lighting of Towns (Ireland) Act, 9 Geo. 4, c. 82, for cleansing, lighting, and watching the town of Bandon. In 1836 fifty persons subscribed a sum of £50 each for the purpose of erecting gasworks to light the town of Bandon. They leased a plot of ground at £5 a year, and with the £2500 so subscribed they erected the gasworks. By indenture, dated the 1st November, 1837, the Commissioners mortgaged the undertaking, and income, and the rates, to three trustees, Thomas Vaugh, William Pope, and Robert Belcher, to secure payment of debentures with interest thereon at £6 per cent. per annum. The three trustees were dead, and no new trustees had been appointed to replace them. There was due on foot of the mortgage a sum of £1900, the balance having been paid off from time to time by the Commissioners.

By the Local Government Act, 1898, section 41, the provisions of the Towns Improvement (Ireland) Act, 1854, were applied to Bandon (amongst other towns), and by the said Local Government (Ireland) Act the said Lighting of Towns (Ireland) Act was repealed. By section 60 of the Towns Improvement (Ireland) Act, 1854, the Commissioners had power to strike a rate each year of 1*s.* in the £, and no more. The Acts relating to water, and the Public Health Acts, were administered by the Rural District Council. The Government valuation of the municipal area of the town was £7834, and the rates produced £339 14*s.* 8*d.* The rates had always been insufficient to satisfy the public purposes for which they were levied, and the plaintiff stated that the Commissioners were in each year indebted to the gasworks in a sum of about £60.

The Commissioners supplied gas to most of the shopkeepers, merchants, and business premises, and private residences in the town, and kept the accounts of the gasworks separate from the town accounts. There were considerable sums of money due to the defendants for gas supplied down to the 31st December, and there were no other means of satisfying the plaintiff's debt except by appointing a receiver, as they had no seizable property.

The plaintiff stated that there was about £500 due to the defendants for the quarter's gas, ending the 31st December, 1906. The particulars of these sums had been ascertained by the defendants from the several meters, and were in possession of the

defendants, and the index of each meter had been delivered to each customer, so that the moneys were actually payable. After paying the interest on the debentures, the defendants would have a substantial balance.

The Town Clerk of the Commissioners made an affidavit in which he stated that the money authorised to be collected was the only money available to satisfy the interest of the debenture-holders, and for the working of the said gasworks, and if taken by the plaintiff must result in closing the gasworks. There was one year's interest due on the debentures down to the 1st November, 1906, amounting to the sum of £140.

On the 13th December, 1906, Johnson, J., made an order appointing the plaintiff receiver, by way of equitable execution, over so much of the amounts due, or to become due, to the defendants as would be sufficient to satisfy the plaintiff's judgment, the said receiver undertaking to account to a Master of the Division if and when required so to do for any sums he might receive under this order. On the 6th February, 1907, the Divisional Court (Andrews and Wright, JJ.) discharged the order, and the plaintiff appealed.

A. M. Sullivan, for the appellant:—

Unless the order is granted, there are no means by which the plaintiff can be paid, and the defendants can go on trading without paying any of the judgment creditors. The only difficulty in the plaintiff's way is the debenture deed, and that is a trust deed, which—if valid at all—creates a general lien on the whole property. A receiver order will be made subject to a claim as to lien: *Levasseur* v. *Mason* (1). The power given to the Court of appointing receivers by the Judicature Act is fully discussed in *Anglo-Italian Bank* v. *Davies* (2). An order for the appointment of a receiver is a "process of execution" within 27 & 28 Vict. c. 112: *In re Pope* (3). Where the judgment debtor has no goods capable of being taken in execution by ordinary process, the plaintiff may be appointed receiver by way of execution over the debts of customers of the defendants, who

(1) [1891] 2 Q. B. 73. (2) 9 Ch. D. 275. (3) 17 Q. B. D. 743.

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were, or would shortly become, indebted to the defendants for goods supplied: *Goldschmidt* v. *Oberrheinische Metall Werke* (1). Discovery will be granted in aid of execution against the judgment debtor. An order was made in a case similar to the present in *Orr* v. *Grierson* (2). *Cohen* v. *Ruddy* (3) is distinguishable from the present case, because the reason of the decision of *Cohen* v. *Ruddy* (3) was that the plaintiff cannot get equitable execution where he can have legal execution. Otherwise the decision in *Cohen* v. *Ruddy* (3) conflicts with three decisions—*Re Pope* (4); *Salt* v. *Cooper* (5); and *Ex parte Evans* (6). In *Hills* v. *Webber* (7), the plaintiff was appointed receiver by way of equitable execution over the interest of a joint tenant in three houses, and the rents were ordered to be severed.

H. D. Conner, K.C., and *George C. Green*, for the defendants:—

This is not a case in which the plaintiff should get a receiver in the King's Bench. The only thing that the plaintiff could get that would do him any good would be an order appointing him manager. The effect of this order would be that the gasworks would be stopped, because if the plaintiff takes the defendants' money the works cannot go on. The Court will not make an order, the effect of which would be to stop the defendants discharging their duty, which, by sect. 46 of 9 Geo. 4, c. 82, they are bound to discharge, of lighting the town.

If the order is made, it will involve the question—whose is the money? *Harris* v. *Beauchamp* (8) decides that a receiver, by way of equitable execution, will not be appointed over book-debts. The debenture-holders must first be paid their interest, and the trust deed presents the same difficulty in this case that the landlord's head-rent did in *Cohen* v. *Ruddy* (3). There is no machinery in the King's Bench Division for taking an account such as would be involved if this order were granted. The object of the Judicature Act, with respect to the appointment of receivers, was, not to enlarge the powers of appointing a receiver, but to enable that to

(1) [1906] 1 K. B. 373.
(2) 28 L. R. Ir. 20.
(3) [1905] 2 I. R. 56.
(4) 17 Q. B. D. 743.
(5) 16 Ch. D. 544.
(6) 13 Ch. D. 252.
(7) 17 T. L. R. 513.
(8) [1894] 1 Q. B. 801.

be done by one Court, which before the Act would have required a suit in a Court of Equity.

The plaintiff is in this dilemma. He obtained the order on the 13th of December. The quarter's gas rents were not then due, and had not been completely earned, and in such a case a receiver ought not to be appointed: *Holmes* v. *Millage* (1); *Re Johnson* (2); *Cadogan* v. *Lyric Theatre* (3). On the other hand, if the plaintiff says that he can avoid this result by the fact that the quarter's rents for gas have now become due, the plaintiff is met by the rule that in such a case the remedy is by garnishee, and not by receiver.

Sir Samuel Walker, C.:—

We are all of opinion that the order appealed from should be affirmed, on the ground that the decisions of this Court, to which we have been referred, are binding on us. We are bound by our own decisions, and we should not be influenced by any authorities which conflict with them. *Cohen* v. *Ruddy* (4) is a conclusive authority on the question. It was the landlord's head-rent which formed the ground of objection in that case against the appointment of the receiver by way of execution, because when the receiver once got the money, it was his duty to pay the head landlord his rent. That was the foundation of the judgment. FitzGibbon, L.J., in giving judgment said—"It is not the practice of the King's Bench to appoint the plaintiff receiver by way of equitable execution, unless where it is proved that all the money that can come to his hands under the execution will be the money of the defendant. Here, to the extent at least of the head landlord's rent, it is not the money of the defendant."

That would follow out the practice of the King's Bench, as stated by Holmes, J., in the elaborate statement contained in the letter (5) which he wrote when *Orr* v. *Grierson* (6) was being considered by this Court. *Orr* v. *Grierson* (6) was a special decision on the particular facts of the case. In his judgment

(1) [1893] 1 Q. B. 551.
(2) [1898] 2 I. R. 551.
(3) [1894] 3 Ch. 338.
(4) [1905] 2 I. R. 56.
(5) The letter of Holmes, J., will be found in a note at the end of this case, *infra*, p. 241.
(6) 28 L. R. Ir. 20.

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FitzGibbon, L.J., said—"I agree that the machinery of the Common Law Division is not adapted for dealing with receivers who have to account, and the 'practice' recited in Judge Holmes' order, of refusing to appoint such receivers over future rents, is quite reasonable. But in such cases as this, and *Dowling* v. *M'Niall* (1), the only money which the receiver can get is justly his own, and all he has to do in the way of 'accounting' is to give credit for it against his judgment." That was an exceptional case, but in the present case this money which would be receivable should be applied under the trusts of the deed securing the debentures—if the receiver does his duty—to the demands of the debenture-holders. That is a stronger case than *Cohen* v. *Ruddy* (2), on the decision in which I rest my judgment.

Palles, C.B.:—

I concur on the short ground that we are bound by the decisions in *Cohen* v. *Ruddy* (2) and *Orr* v. *Grierson* (3). *Cohen* v. *Ruddy* (2) was decided on the reasoning of *Orr* v. *Grierson* (3); but the grounds of the decision in *Orr* v. *Grierson* (3) do not appear so clearly in the report of the case in the Law Reports as in the note of it in the Registrar's Book. It was decided in December, 1890—sixteen years ago—and the practice laid down by it was that stated in a letter written by Holmes, L.J., to the Lord Chancellor, which has already been read. That case decided that the practice of the Queen's Bench and Exchequer Divisions in relation to the appointment of receivers by way of equitable execution was right, although the actual decision in it was that the circumstances in it took it out of the general rule. The facts of the present case bring the case within the practice stated in *Orr* v. *Grierson* (3), and *Cohen* v. *Ruddy* (2).

Holmes, L.J.:—

I concur with the Lord Chancellor and the Chief Baron. If the practice had been different, there might have been difficulties in the way of sustaining the order of Johnson, J., owing to the

(1) Not reported. Ex. Div., 2nd March, 1888.
(2) [1905] 2 I. R. 56. (3) 28 L. R. Ir. 20.

generality of its terms. But I do not rest my judgment on that. I rest my judgment on the decisions of *Orr* v. *Grierson* (1) and *Cohen* v. *Ruddy* (2).

The letter referred to by the Lord Chancellor was written by Holmes, J., to Lord Ashbourne, when *Orr* v. *Grierson* (1) was being discussed in the Court of Appeal, in answer to a letter from Lord Ashbourne asking for information as to the practice of the Queen's Bench Division. It was as follows:—

"*7th November*, 1890.

"According to my recollection, the application in the case you mention was on behalf of a judgment creditor to appoint a receiver over the rents and profits of lands or houses till the judgment debt would be satisfied—in other words, to appoint a receiver of the same kind and practically for the same purposes as the Receiver Judge. This, the Queen's Bench Division, so far as I know, has never done. I have never known it to be done, and such an application has again and again been refused.

"I do not know the practice of the Exchequer, but I would be greatly astonished to hear that the Chief Baron had made such orders. The ground of our practice is that we have no machinery for the supervision and guidance of receivers of this kind. You are, of course, aware that in the Land Judge's Court there is an elaborate code of rules and a staff of officers dealing with receivers. The receiver is an independent officer of the Court, selected from the Court receivers: he gives security in a special manner; he causes orders to pay (I think) to be served on the tenants; he ascertains and keeps down of his own motion a certain class of outgoings, and he takes the directions of the chief receiver or the Judge as to outgoings of another kind; he files and vouches his account at certain periods; he lodges balances, etc.

"These rules and this machinery do not apply to the Queen's Bench Division. We sometimes—in the case of rents already due, where there is a technical objection to giving a garnishee order—appoint a receiver over a specified gale or a specified amount, and I think we once, under the very special circumstances, gave a receiver over a single specified gale of rent payable by a tenant before it had become due; but beyond this we have never gone. We have been often told that the judgment is small, and that the rents of the premises would pay it off in a year or

(1) 28 L. R. Ir. 20. (2) [1905] 2 I. R. 56.

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two; but, so far as I know, we have always adhered to our practice, and it would cause great embarrassment if we were obliged to deviate from it. There is hardly any land in Ireland that is not charged or incumbered in some way. The interests of head landlords, of tenants, and of incumbrancers must be considered, and if the plaintiffs or their solicitors should be put into the receipt of the rents and profits of a defendant's lands without responsibility or superintendence, a fresh complication will be introduced into the Irish Land Question. The Irish law provides a distinct method by which the judgment creditor can realize his debt from the lands of the defendant, and therefore the plaintiff has his remedy. Gibson, J., has just been in here, and I have read him the above. He agrees with me that it accurately represents the practice of the Queen's Bench, and he reminds me that the Chief Baron told us in the Rules Committee that it is the Exchequer practice also. In fact, we should have inserted a rule making it clear that no such receiver would be appointed in the Common Law Division, and it was considered that the practice was now definitely settled."

Solicitor for the appellant: *T. Early.*
Solicitor for the respondents: *A. Julian.*

R. D. M.

K. B. Div. 1907.

Jan. 14, 15, 21.

THE KING (at the Prosecution of THE POSTMASTER-GENERAL) *v.* THE GREAT NORTHERN (IRELAND) RAILWAY COMPANY (1).

Post Office—Railway Company—Carriage of mails—Demand of Postmaster-General—Mail trains—Hours and times—Conveyance of Mails Act, 1838 (1 & 2 *Vict. c.* 98), *s.* 1—*Railways Regulation Act*, 1844 (7 & 8 *Vict. c.* 85), *s.* 11.

The Postmaster-General, who is empowered by the Conveyance of Mails Act, 1838, upon service of a twenty-eight days' notice, to require the conveyance and forwarding of the mails by a Railway Company "at such hours or times in the day or night" as he should direct, is not restricted to the naming of fixed and definite hours for the departure and running of mail trains, but is entitled to name variable times, by making the departure and running of the mail trains dependent on the time of the arrival of the mails in ordinary course of through transit by rail and sea.

(1) Before Palles, C.B., and Madden and Kenny, JJ.

MOTION on behalf of His Majesty's Postmaster-General to make absolute a conditional order for a mandamus directed to the Great Northern Railway Company commanding them that they do forthwith, pursuant to the provisions of the statute 1 & 2 Vict. c. 98, comply with the demand and request contained and specified in a certain notice in writing dated March 9, 1906, under the hand of Henry Babington Smith, Secretary to the Post Office, requiring and directing that His Majesty's mails should upon and after the 10th April, 1906, be conveyed by the Company at the time and subject to the regulations and restrictions as to speed of travelling, places, times, and duration of stoppages, and times of departure and arrival, respectively, mentioned in the time-bills annexed to the notice, and that they do take, receive, and carry respectively all such mails as should be tendered to them, together with the guards (if any) in charge thereof, and that they should leave the mails at the respective places in the time-bills annexed; and that they should further comply with the demand and request of the Postmaster-General contained in the proviso embodied in the notice that when the English mail which was due to reach Amiens Street (City of Dublin Junction Railway) station at 5.53 a.m. should not arrive there by 6.5 a.m. the mail train for Belfast which was due to leave Amiens Street at 6.5 a.m. should await the arrival and transfer of the English mail, provided it arrived at Amiens Street not later than 6.20 a.m., and that the arrival and departure of the mail train at Drogheda, Dundalk, Portadown, and the arrival at Belfast should in such case be as many minutes later as the period of detention of the train at Amiens Street station, and that the mail train to Londonderry which was timed to leave Portadown at 8.12 a.m. should, on all occasions, await at Portadown the arrival from Dublin of the mail train to Belfast; and further, that they should do every act in the premises necessary to carry out the demand and requirements of the Postmaster-General contained and specified in the notice and the proviso therein.

Prior to the service of the notice mentioned in the conditional order, several agreements in relation to the carriage of the mails had been entered into between the Postmaster-General and the Company.

By an agreement of 20th December, 1887, the Company

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covenanted that they should from time to time, when required, convey as well by their express as by their ordinary and accustomed railway trains and carriages, all such mails as should for that purpose be tendered to them. This agreement further provided that in case the English mail intended to be despatched by the day mail from Dublin then timed to leave the railway terminus, Dublin, at 7.25 a.m. should not then have arrived, such train should be delayed until 7.40 a.m. The Postmaster-General was to have power to alter or vary notices theretofore served on the Company as to the times of despatch and arrival, &c., and the agreement was to continue until 31st March, 1895, and after that date until one of the parties should have given to the other six months' notice in writing to determine same; but such determination should not affect the rights of the Postmaster-General under any notices served, or to be served, under the Post Office Acts; and the services performed, or to be performed, under such notices should continue to be discharged notwithstanding such determination: and the remuneration for such services should, if necessary, be referred to and fixed by arbitration, as provided by the Act 1 & 2 Vict. c. 98.

The conditions as to the detention of the down limited day mail train from Dublin to Belfast in the event of the late arrival of the English mail at Amiens Street were modified by an agreement dated 2nd November, 1892; and by a further agreement dated 5th June, 1902, it was provided that for an increased subsidy, making in all £44,413 per annum, the Company should run the mail and other trains according to the times mentioned in the bills annexed thereto. Under this time-bill the time of the departure of the Dublin to Belfast down limited daily mail from Amiens Street was scheduled at 6.5 a.m., and by a provision in the agreement this train was bound to await the arrival of the English mail until 6.20 a.m. It was further provided by this agreement that if it was found practicable to start the train with "reasonable punctuality" the Company should accelerate the mail train from Portadown to Londonderry by ten minutes, on a request to that effect from the Secretary to the Post Office in Ireland, all these matters being subject to six months' notice on either side to terminate, but without prejudice to the validity of the notices served.

By notices dated 5th October, 1905, the Postmaster-General determined the contract under the agreements of 20th December, 1887, 2nd November, 1892, and 5th June, 1902, and notified that the arrangements as to conveyance of the mails therein mentioned should absolutely cease and determine as from the 10th April, 1906, and the services provided for by statutory notices were also absolutely determined; and by a statutory notice of the same date the Postmaster-General directed that the mails should be carried from the 10th April, 1906, according to a time bill annexed.

The next step was the statutory notice of 9th March, 1906, the terms of which have been set out above, and which it was sought to enforce by the present mandamus proceedings.

The Company complied with this notice; but on 10th October, 1906, served notice on the Secretary to the General Post Office stating that as the new requirements would so disarrange the working of their ordinary passenger service on the northern section of the line, they did not see their way to acquiesce, and from 1st November then next the 6.5 a.m. post office train from Dublin would be started at 6.10 a.m. if the English mail had not then arrived. On the morning of 7th November, 1906, the English mail to Ireland (*via* Holyhead) reached Kingstown late. On the arrival of the mail steamer at Kingstown the mail officer who attended the steamer then advised by telegram the station-master at Amiens Street to expect the mails for the North of Ireland at that station at 6.16 a.m. The mail train from the pier actually reached Amiens Street at 6.14 a.m. on that date, but the train for Belfast, timed to leave at 6.5 a.m., had then already been despatched contrary to the requirements of the statutory notice. The mail officer in charge was obliged to order and did order a special train to carry the English mails to the North of Ireland, which left Amiens Street station at 6.24 a.m.

By way of cause against the making absolute of the conditional order for mandamus, Mr. Henry Plews, General Manager of the Company, submitted that the hours and times of the day or night at which the Postmaster-General was empowered under the 1 & 2 Vict. c. 98 to direct that special trains for the conveyance of the mails shall be provided must be fixed and definite hours and times,

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and that the provisoes contained in the notice of 9th March, 1906, were not in accordance with the powers conferred on the Postmaster-General by the Act. The Company had always been ready and willing to comply with a notice stating fixed and definite hours for mail trains, but they submitted that they could not be compelled to start a train at variable hours between 6.5 a.m. and 6.20, and that the notice and proviso therein were unreasonable, and that the notice required the Company to forward the mails at a rate of speed exceeding that authorised by the 7 & 8 Vict. c. 85. The English mails very seldom arrived at Amiens Street in time to be forwarded at 6.5 a.m. Owing to the mail train being delayed at Amiens Street, a number of trains running into Belfast in the morning (the period of the day when passengers were going to business) were seriously interfered with and delayed, and also a number of trains on the Derry line, which was a single line, were seriously interfered with. Up to 1891 there was a margin of forty minutes left for the transfer of the mails from Westland Row to Amiens Street, and to cover any but exceptional delays which might arise from fog or storm. In 1891 the margin was reduced from 40 minutes to 28; and in February, 1892, when the Loop-Line was used for the carriage of the mails, a time-table was arranged by which a margin of 24 minutes was left for transferring the mails from the Loop-Line station at Amiens Street to the mail train for the north, and as the actual transfer of the mails, once they arrived at Amiens Street, only occupied about 8 minutes, this left a fair margin for other delays, and this continued up to May, 1897, and up to that time the mail-train was seldom delayed. In 1897 the margin was reduced to 12 minutes, and from that time the mails had been getting later and more irregular.

The Secretary to the Post Office made an affidavit in reply, in which he stated that for the twelve months of the year ended August 31, 1906, the train left at 6.5 a.m. with the English mails; or at or about 6.5 a.m. without the English mails on 121 out of the total of 311 days on which it ran, or 39 per cent. of the total, and on 74 other occasions it was not detained more than five minutes.

The statistics kept by the Post Office officials showed that

the special mail trains, which the non-compliance by the Company with the direction of the Post Office rendered necessary, interfered as much with the Company's traffic as did the 6.5 a.m. mail train when running late. The objection based upon the speed-limit of twenty-seven miles per hour specified by the Railways Regulation Act, 1844 (7 & 8 Vict. c. 85, sect. 11), had never been raised by the Company throughout the negotiations, and it was submitted that the enactment did not derogate from the powers vested in the Postmaster-General under the Conveyance of Mails Act (1 & 2 Vict. c. 98, sect. 1), under which he might require the mails to be carried at any rate of speed not exceeding the maximum rate of speed prescribed by the directors of the Company for the conveyance of passengers by their first-class trains. The 43½ miles per hour specified in the notice fell within these descriptions; and that this rate of speed was not unreasonable, might be gathered from the fact that the mail train to Belfast had occasionally made up from five to ten minutes on the journey when it had left Dublin late. The Post Office would prefer that the train were timed to leave Dublin fifteen or twenty minutes later than it was timed so as to secure more regular working; but the great commercial interests of the North of Ireland would be seriously affected by such an arrangement, and the business people of Belfast and elsewhere had always insisted on getting the English mail at the earliest possible hour. The delays that had occurred, so far as they did not arise from bad weather in the channel, had been due, to some extent, to the development of the Irish tourist traffic from England, but mainly to the carrying of third-class passengers by the London to Holyhead mail trains—causes which were beyond the control of the Post Office. The long interval allowed, before 1892, for the transfer of the mails from Westland Row to Amiens Street, was due to the fact that the mails were transferred by cart. In 1892 the interval was fixed at 13 minutes (and not 24 minutes), namely, from 6.32 a.m. to 6.45 a.m., and was subsequently reduced to 12 minutes.

The General Manager of the Company made a further affidavit in which he stated that it was because the Company were unable, in practice, to carry out the agreements and notice that they were

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opposing this present proceeding, and they did not think it reasonable or safe for themselves or the travelling public to have to depend upon subordinate officials of the Company carrying out the alterations in the trains when running out of course. The obligation to wait 15 minutes at Dublin with the morning mail was originally provided to cover extraordinary delays, which were of rare occurrence, and the margin in Dublin between the hour when the English mails were due, and the departure of the Great Northern (Ireland) trains for the North, was sufficient to meet ordinary delays and avoid the necessity of the latter train leaving late. Since the acceleration of the mail train, and the carrying of the third-class passengers from London, the delays had been almost of daily occurrence, and for the year ending August 31st, 1906, amounted to 74 per cent. of the working days.

The Right Hon. The Attorney-General, and *The Solicitor-General* (with them *Samuels, K.C.*, and *Dudley White*), for the Postmaster-General.

Gordon, K. C., and *The Right Hon. J. H. Campbell, K.C.* (with them *Denning*), for the Great Northern Railway Company.

The arguments are sufficiently stated in the judgment of the Lord Chief Baron.

The following cases were referred to:—*The Queen* v. *The Irish South-Eastern Railway Co.* (1) and *Phillips* v. *The Great Western Railway Co.* (2).

Cur. adv. vult.

Jan. 21.

PALLES, C.B.:—

To my mind this is an absolutely plain case. The application is for a mandamus to the Great Northern Railway Company to convey the mails to Belfast, Londonderry, and the intermediate stations, by a train which shall leave their Amiens Street station at 6.5 a.m., and shall run in accordance with a time-table contained in a notice of the Secretary of the Post Office of the 9th March, 1906. This notice contains a proviso that when the English mails shall not arrive at the Amiens Street station by that hour the train shall

(1) 1 Ir. C. L. R. 29. (2) L. R. 7 Ch. App. 409.

await the arrival and transfer of those mails, if they arrive at that station not later than 6.20 a.m., and that in that case the arrival of the trains at Belfast, Londonderry, and the intermediate stations shall not be later than the times mentioned in the time-table by any greater period than that of the detention of the train at Amiens Street beyond 6.5 a.m.

The obligation on the Railway Company to convey the mails is imposed by the Railway Conveyance of Mails Act, 1838 (1 & 2 Vict. c. 98, section 1). That section, after reciting that "it is expedient that provision should be made by law for the conveyance of the mails by railways at a reasonable rate of charge to the public," empowers the Postmaster-General, by notice in writing, delivered to the Railway Company, to require that the mails shall "from and after the day to be named in any such notice (being not less than twenty-eight days from the delivery thereof) be conveyed and forwarded by such Company, either by the ordinary trains of carriages, or by special trains, as need may be, at such hours or times in the day or night as the Postmaster-General shall direct, . . . and thereupon the said Company shall from and after the day to be named in such notice . . . receive, take up, carry and convey, by such ordinary or special trains of carriages . . . all such mails as shall be tendered to them, . . . and leave such mails at such places in the line of such railway, on such days, at such hours and times in the day or night, and subject to all such reasonable regulations and restrictions as to speed of travelling, places, times, and duration of stoppages, and times of arrival, as the Postmaster-General shall in that behalf, from time to time, order or direct." This obligation may be conveniently divided into two parts, first, that to receive at the station of departure and to convey by train at the hour directed. This is not subject to any qualification whatever. The second part of the obligation, *i.e.* to leave the mails at the specified place "in the line of such railway," is subject to two provisions—(1) the regulations and instructions of the Postmaster-General must be reasonable, and (2) there is an express proviso in the section "that the rate of speed to be required shall in no case exceed the maximum rate of speed prescribed by the directors for the conveyance of passengers by their first-class trains."

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Upon the 9th of March, 1906, a notice in writing was delivered by the Postmaster-General to the defendant Company, requiring that from and after a day now past, they should carry the mails in the manner now sought to be enforced. No question arises as to the time of the service of the notice.

The defendant Company, however, contend that they are not under an obligation to carry the mails in the manner required, for three separate reasons :—

1. Because the hour of departure, not being absolutely fixed by the notice, but being thereby made dependent upon the time of the happening of a future event, viz. the arrival of the English mails at Amiens Street terminus, is not a directing of an "hour" or "time," within the meaning of the section I have read.

2. That the rate of speed which the Postmaster-General is entitled to require is, by sect. 11 of 7 & 8 Vict. c. 85, limited to 27 miles an hour—a rate admittedly exceeded by his requisition.

3. That the requisition that, in the case of a late departure, the arrivals at Belfast, Londonderry, and intermediate stations shall be extended only by the same number of minutes as that by which the train has been delayed at Amiens Street, is unreasonable.

These are the objections of substance—those which involve questions of right. They rely further on two objections, which are matters of form, in this sense that they admit the obligations, but insist that they should not be enforced in this proceeding :—

4. That the requisition of the Postmaster-General is wrong in form, as it exceeds his powers by requiring the detention of one of the ordinary trains of the Company.

5. That the mandamus should be refused, upon the ground that the Postmaster-General has available, and ought to resort to, another remedy.

In support of the first objection, it has been argued that, upon the true construction of the section, the notice of the Postmaster-General ought to direct some *fixed* hour of the day or night for the departure of the train, in order that the Railway Company may, within the twenty-eight days which must elapse between the delivery of the notice and the commencement of the obligation, so

adjust the times of their other trains as to enable the requisition of the Postmaster-General to be complied with.

Now, whilst it is clear that the object of requiring the twenty-eight days between the delivery of the notice and the running of the train in question is to enable the Railway Company to adapt the working of their system to the running of the required train, I am clearly of opinion that, upon the true construction of the section, the "hour" or "time" is sufficiently directed by the notice by making it dependent upon the time of the performance of a future act, such as the arrival at Amiens Street station of mails carried there, according to a fixed and regular service, as are the English mails, which, as we know, are carried to Amiens Street over the Kingstown and Junction lines upon the arrival at Kingstown of a boat which is run in correspondence with a train which leaves London at a fixed hour. I think that their obligation goes farther than this; but the obligation I have mentioned is sufficient, if it exists, to determine this case.

The object of the section, as declared by its preamble, is to provide that the mails shall be carried at a reasonable rate of charge to the public. This is effectuated by sects. 6 and 16 of the Act, which enact that the Railway Company shall be entitled to such reasonable remuneration for the conveyance of the mails *in manner required by the Postmaster-General* as shall be agreed upon between the Postmaster-General and the Company, or as, in default of such agreement, shall be settled by arbitration. Section 1, therefore, should be read as imposing upon the Railway Company an obligation co-extensive with that which might be created by contract, and is limited only by their capacity to perform. By that I mean this, that whatever the Railway Company might reasonably do for a high rate of remuneration to be fixed by agreement, that same thing they ought to do upon requisition, although the remuneration will, in that event, be fixed, not by agreement, but by arbitration.

Now, first, let us see what they *can* do. This is very clearly shown by the subsequent part of sect. 1. Under it, the Company, having started the train at the time directed by the Postmaster-General, is subjected to the further obligation of delivering the mails "at such places, in the line of such railway, at such hours

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or times in the day or night, and subject to all such reasonable regulations and restrictions as to speed of travelling, places, times, and duration of stoppages, and times of arrival, as the Postmaster-General shall in that behalf, from time to time, order or direct."

This section plainly supersedes the discretion which the directors of the Railway Company otherwise would have had, of regulating the running of the train which is controlled by the twenty-eight days' notice of the Postmaster-General. I entertain the clearest opinion that the right of the Postmaster-General, under this section, is one paramount to the powers of the directors; and as the right of the general travelling public is restricted to the use of such trains as the directors, in the reasonable exercise of their discretion, shall provide, the right of the Postmaster-General is also paramount to any so-called right of the general public. The right of the Postmaster-General is in the nature of that which in some countries is called "eminent domain." The State, for purposes which it deems beneficial to the public, authorizes a Railway Company to take the lands of others compulsorily; but if it can compulsorily take the lands, it can compulsorily direct their use, and can, consequently, direct that the title thereto of the Railway Company shall be subject to the condition that the first and primary use to which those lands shall be subjected shall be the great public purpose of carrying the mails. Further (which, however, is entirely immaterial to the legal question), this right is reserved in such a manner that it cannot injure the Railway Company, for whilst the Postmaster-General is left absolutely free as to the time at which he may by his twenty-eight days' notice direct that the train shall be started, that for which the remuneration of the Railway Company is to be measured is, the conveyance of those mails "in manner required by such Postmaster-General" (sect. 6). Thus, if the time of starting be an unreasonable one, or one which subjects the Company to greater inconvenience or interference with their other trains than is necessary, the Railway Company will be entitled to be paid the more the greater the inconvenience. Although I say this, it is not for a moment to be assumed that I consider the mode of conveyance required by the Postmaster-General is either unreasonable or involves any greater inconvenience than is absolutely necessary. On the contrary, I hold

his requisition to be an eminently reasonable one; but I mention the matter because, as, in every case, one particular individual or body must be the ultimate *dominus*, and have the discretion, I desire to emphasize that, in reference to a train run under the twenty-eight days' notice of the Postmaster-General, he, and he alone, is the *dominus*; his, and his alone, the discretion to regulate its running. Everything which, in relation to other trains, is to depend upon the discretion, and to be subject to the regulation, of the directors, is to be regulated, not by them, but by the Postmaster-General.

The Postmaster-General thus being the *dominus*, let us see the object for which the Legislature invested him with this power. It is plain that, under this Act, the use of railways was to be, for the future, part of the Post Office system, not as matter of agreement, but as matter of right. The mails necessarily include letters to and from England and other places, which must be carried partly by land and partly by sea. It is common knowledge, in fact, it is part of the history of the country, that prior to the introduction of railways, resort was had to every known means to accelerate the carriage of the mails. The mail-coaches were the property of the State; one mail conveyance used to correspond with another. When mails had to be transferred from one vehicle to another, that other used to await the arrival of the first, so that there should be a minimum of delay. When mails were brought across the sea, the land mail conveyance used to await the arrival of the mail-boat. All mail arrangements involved the minimum of delay. That was the system into which this Act contemplated the introduction of the compulsory use of railways. The Postmaster-General has, then, to direct the hour or time, in the day or night, at which the mail train is to leave. This hour or time is to be specified, and made certain, by a written notice, but there is no other restriction added. Now, whatever words used in another written document, such, for instance, as a contract, would be sufficient to fix the time, will, in my opinion, be sufficient in a notice under this section to direct the time. It follows that it is not necessary that a fixed hour should be stated. In a contract with a carrier, the words "on the arrival of a boat," running in a particular specified regular service, would be quite sufficient to

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specify the time at which his conveyance was to be at the place of arrival; and, in my opinion, the plain object and intention of this section coerce us to read these general and unrestricted words in such a sense as to include times so fixed.

The second objection, as to the rate of speed required being in excess of 27 miles an hour, is founded upon sect. 11 of the 7 & 8 Vict. c. 35. It recites that the provision made for the transmission of mails by railway by the 1 & 2 Vict. c. 98 should be *extended*, and it enacts that the mails shall be forwarded at any rate of speed which the Inspector-General of Railways for the time being shall certify to be safe, not exceeding 27 miles in the hour, including stoppages." The defendants insist that that provision is to be taken as a substitution for the previous enactment, by which the limit was fixed at the maximum rate of speed prescribed by the directors for their first-class passenger trains. I am satisfied, not only by the words of the section, but by the policy of the Acts taken as a whole, that it was not a substitution, but an additional provision. The principle of the Act of 1838 was that the Post Office should be entitled to the best rate of speed fairly available; and the Act measured that best rate of speed by the rate at which the directors could run their first-class passenger trains. The idea was that, if they could carry passengers at that rate, so also could they carry the mails at the same rate. Thus the rate of carriage of the mails on a particular railway depended, not upon the maximum speed at which a train could be run without danger to the public, upon a railway run in the best manner, but upon the rate attained on the actual railway in question. The particular railway might be a small one, and not worked up to its full capacity. This, then, was the mischief to be remedied, and the remedy provided was that the Post Office rate should be, not only the maximum rate that was actually run, but at least a rate which the Legislature considered ought reasonably to have been attained, although, in fact, it had not been attained; a rate which the Legislature could prescribe with certainty to be a safe rate, and that safe rate was fixed at 27 miles an hour But this determination of a minimum rate—a determination which, on the face of it, was applicable only to railways which did not run their trains at rates at which they fairly could—was not inconsistent with, and cannot be deemed to have affected,

the continuance of the principal and more general provision that in all cases the Postmaster-General should be entitled to the best speed, whatever that best speed might be, as ascertained by the actual working of the railway in question.

The third argument is that, although for years this Railway Company has, under agreement, been running this train with certain definite limits of time between Dublin and Belfast and Londonderry, and each intermediate station, such as Drogheda, Dundalk, and Portadown, it is unreasonable to put them under such an obligation when the train is run, not by agreement, but under notice. The argument was that, although such a regulation might be reasonable when the train started at a fixed hour, it was not reasonable when the hour of departure was a variable one. At present, I do not refer to the fact that, heretofore, the train was not, in fact, run at a fixed hour, because, I think, upon the evidence, that the extent of the irregularity in the time of departure has been greater within the last year than it had been theretofore. My opinion is grounded upon a much higher consideration. It is admitted that, were the time for departure fixed, the condition in question as to the time of arrival at intermediate stations, and at the ultimate destination, could be complied with, and would be reasonable; but it is said that there is more difficulty in making arrangements when the time of departure is variable. I admit it; but the view of the Act which I have already expressed is that the rights of the directors as to the running of their trains are subject to the paramount right of the Postmaster-General to run such a train as he is entitled to under section 1. Assuming, as I do, for the purpose of this objection, that he is entitled that his mail train shall be started at a time variable within the limits mentioned in his notice, then it follows that the directors are bound to make arrangements to have such a clear run for that train as if it were a train the hour of departure of which was absolutely fixed. Further, the question of reasonableness is one of fact; and if it be, as I think it is not, subject to any doubt, it should be determined by a jury upon a plea to the mandamus.

The fourth point is one I have never been able to appreciate. As to it, I begin by saying that I consider it immaterial to refer to anything which took place prior to the 10th April last. Up to

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that time trains had been run by this Railway Company for the Postmaster-General under certain arrangements or agreements, all of which ceased and determined upon that 10th April, 1906. What we have to determine is the time at which, and the mode in which, the trains after that date should be run, and that depends entirely upon the terms of that notice.

> "The said last-mentioned notice of the 5th October, 1905, is hereby absolutely and entirely repealed, annulled, cancelled, and withdrawn, and in lieu of, and in substitution for, the services specified therein, I do by this notice require and direct that the mails shall, upon and after the 10th April, 1906, be conveyed by you on your railway at the times and subject to the regulations, &c., in the time-table hereunto annexed.
>
> "Time-table No. 5, Dublin to Belfast. To leave Amiens Street at 6.5 a.m."

These words contain nothing in reference to the train which previously had left Dublin at that hour. This is to be a train subject to new conditions. If it rested there, it would have been quite immaterial whether it was to be deemed an ordinary or a special. Then the notice states:—

> "Provided, however, that if the English mail, which is due to reach Amiens Street, in the city of Dublin, at 5.53 a.m., shall not arrive there by 6.5 a.m., I direct that the mail train for Belfast, which is due to leave Amiens Street at 6.5 a.m., shall await the arrival of that train."

That requisition, in my opinion, makes the new Post Office train a special one, if there be any materiality, save as to cost, between a special and an ordinary train. It does not, as has been argued, involve the stopping or detention of any ordinary train of the Company, using the word "ordinary" in the sense of a train not under the control of the Postmaster-General. The train described in the notice as due to leave Amiens Street at 6.5 a.m. is the train mentioned in the "Time-table, No. 5," the train subject to the new condition. There is nothing in the notice to prevent the Railway Company despatching, if they wish, a train at 5 minutes after 6 a.m. to carry passengers. It does, however, prevent them carrying the mail by a train so despatched, provided the English mail had not arrived there by 6.5 a.m.

As to the last point, that the proper remedy of the Postmaster-General is by suing the London and North-Western Railway Company for not arriving at Holyhead up to time, I only say

that, according to all settled principles, that is not such another beneficial remedy as, in a case like the present, disentitles the Postmaster-General to a mandamus.

In all well-designed works where it is known that there is a possibility of a break-down at a particular point, efficient provision is made to reduce to a minimum the evil consequences of such a breakdown. Experience shows that the arrival of the London train at Holyhead is sometimes behind time, and that this necessarily involves a late arrival at Amiens Street. Rough weather in the Channel may reasonably have this effect. So also may other causes. Are we to lay down as matter of law that a delay of 15 minutes from any cause, instead of causing a delay of merely a similar length in the ultimate delivery of the mails, is to delay that delivery for hours? I emphatically answer that we are not.

The conditional order must be made absolute.

MADDEN, J.:—

I agree, for the same reasons.

KENNY, J.:—

I concur. The rights of the Postmaster-General are, in the main, governed by the provisions of the Act, 1 & 2 Vict. c. 98, under which he claims to be entitled to have the mails despatched not alone at such fixed and definite hours as he shall by notice prescribe, but at such variable times as may be necessitated by postal needs and exigencies. His demand, in the present case, is that the morning mails, both Irish and English, for the North of Ireland, are to be despatched from the terminus at Amiens Street at 6.5 a.m., or—if the English mails have not arrived, or, having arrived, are not transferred—at such later hour, up to 6.20 a.m., as will afford an opportunity for their arrival and transfer. If the latter are not in a position to be despatched by 6.20 a.m., the Railway Company is not called on to further detain that train, already, presumably, laden with the Irish mail. It is admitted by the Railway Company that the Postmaster-General has the most arbitrary power of naming any particular hour of the day or night for the despatch of a mail train, so long as that hour is a certain and definite one, and they say that, according to the

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true construction of the statute, that is the limit of his authority. It is also contended that the claim to have a mail train sent at variable hours is of such an unreasonable character that a writ of mandamus should not issue for the purpose of enforcing it.

The case is an important one in this, that the Postmaster-General asks us to say, in the public interest which he represents, that in the control of the trains for the conveyance of the mails he is omnipotent as to the hours of their departure in all cases where he gives the twenty-eight days' notice provided by the statute. His power depends altogether on the terms of the latter. The language is significantly wide and comprehensive. It does not limit him to the selection or fixing of "hours" of despatch, but empowers him to require the conveyance and forwarding of the mails "at such hours or times in the day or night as he shall direct." If he were to be restricted to the naming of certain and definite hours of departure, the power for that purpose would be amply conferred without the use of the words "or times." I cannot, therefore, suppose that these latter words were intended to convey the same meaning as the preceding word "hours," and if they do not mean the same thing, I can come to no other conclusion than that, "times" being an expression of greater generality than "hours," it was not intended to restrict the Postmaster-General to the selection of definite and certain periods, but, on the contrary, to give him paramount and supreme authority as to the movements of the mail trains—including the detention and subsequent despatch of any particular mail train. I think this view is confirmed by the later portion of the 1st section, providing for the making of reasonable regulations by the Postmaster-General. But I wish to add that if the section contained only the word "hours," and omitted the reference to "times," I would be still of opinion that the Postmaster-General's paramount right of control was unreservedly created.

I am, therefore, of opinion that, so far as the construction of the Act of Parliament is concerned, the Postmaster-General has the power he claims of ordering, by his twenty-eight days' notice, that a particular mail train shall, in certain events, start at a definite hour, and, in certain other events, shall be detained for any period indicated by him.

As to the argument based on inconvenience to the traffic, I have no doubt that the detention of this 6.5 o'clock train may cause inconvenience to the Company in the arrangement of its traffic, and probably to some members of the travelling public in the North of Ireland; but such inconvenience could not possibly be of such volume or character as to afford an answer to the present application for the issue of the writ. For many years the Railway Company have been in the habit of doing, under contract, what the Postmaster-General now requires them by notice to do, and it is a matter of common knowledge and experience that in all cases of mixed through traffic, involving both a land and a sea journey, railway companies supply for the mails what are known as "boat trains," and these boat trains are frequently liable to detention—the periods varying with the arrivals of the steamers. Whatever the inconvenience may be, it certainly is not insuperable, and if not, the demand which involves it could not, in my opinion, be of such an unreasonable character as to afford an answer to this application.

The right of the Postmaster-General to be awarded the costs of these proceedings was discussed after judgment was delivered, but the question was allowed to stand over until the return to the mandamus.

Solicitor for the Postmaster-General: *Baillie Gage.*
Solicitors for the Great Northern Railway Company: *Crawford & Lockhart.*

J. L.

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THE KING *v.* PETER DOLAN AND OTHERS (1).

Jan. 16, 17, 30.

Contempt of Court—Criminal prosecution—Disagreement of jury—Pending proceeding—Comment in public speech—Newspaper report—Absence of danger of prejudicial interference with future trial—Costs.

Upon the trial of D. and others for unlawful assembly at Winter Assizes the jury disagreed, and the traversers were bound over to attend and take their trial at the ensuing Spring Assizes. In a speech at a public meeting, delivered after the disagreement of the jury, L., a former Chief Secretary for Ireland and Member of Parliament, made some references to the trial and its result, which were reported without comment in the *Irish Times* and *Daily Express* newspapers of the following morning. He related the facts as disclosed at the trial, and, in effect, he conveyed that the disagreement of the jury was a miscarriage of justice. The speech was, by means of a question in the House of Commons, brought under the notice of the Attorney-General, who said that, in his opinion, the language used would not have any effect upon the jurors at the second trial, and he did not propose to take any action. Upon an application to commit L. and the representatives of the newspapers for contempt, L.'s defence was that the speech was a political one, and his object was to show that the action of the jury was neither surprising nor unreasonable, having regard to the way in which acts of unlawful assembly and boycotting were minimised in the House of Commons by the Chief Secretary of the day. He in no way suggested or assumed the guilt of the traversers, and he had not present to his mind the possibility of the case being tried again. He added that, if he had said anything which could be considered as calculated in the very slightest degree to prejudice any further trial of the case, nothing was farther from his mind. He further asserted that the application was a mere political move, and not for the redress of any real or *bona fide* grievance:

Held, by the Court (Lord O'Brien, L.C.J., and Madden and Kenny, JJ.; Palles, C.B., *diss.*), that, as nothing that was said or done was really calculated to prejudice the fair trial of the accused, the application should be refused, but without costs, as a reference had been made to a trial which was still pending.

Per Lord O'Brien, L.C.J.: The action of the Attorney-General should not be the ground of the decision of the Court, but ought to suggest very great caution in dealing with the matter.

(1) Before LORD O'BRIEN, L.C.J., PALLES, C.B., and MADDEN and KENNY, JJ.

Per Palles, C.B.: While concurring with the majority of the Court as to the representatives of the Press, the contempt by L. required the imposition of a substantial pecuniary penalty.

MOTION on notice (1) for a writ or writs of attachment for contempt of Court against the Right Hon. Walter Long, M.P., W. A. Locker, editor, and A. A. Hall, secretary of the *Irish Times*, and the Right Hon. Lord Ardilaun, proprietor, and John Y. M'Peake, editor of the Dublin *Daily Express*.

The facts of the case were summarised in the earlier part of the judgment of Kenny, J., as follows:—

"This is an application to the Court for the exercise of the summary jurisdiction it possesses in cases of contempt—the particular contempt alleged being the making and publishing of comments prejudicial to the accused in a pending criminal trial. The applicants are Peter Dolan and seven other persons who have been returned for trial on charges of riot and unlawful assembly in the county of Leitrim. The principal person against whom this application is directed is Mr. Walter Long, M.P., a gentleman who has filled several high offices of State, including that of Secretary for Ireland. The other individuals sought to be made amenable to this summary jurisdiction are the representatives of two leading Dublin journals, viz., the *Irish Times* and the *Daily Express*. The circumstances which give rise to the present application are these. The applicants were tried on the charges which I have mentioned at the Connaught Winter Assizes at Sligo on the 5th December, 1906, before Mr. Justice Gibson. The jury disagreed and were discharged, and the trial of the prisoners was adjourned to the next assizes for the county of Leitrim. A report of that trial appeared in the Dublin newspapers of the 6th December, but I do not propose to refer to that report, or to the circumstances that gave rise to the charges against the prisoners. On the evening of the 7th December a meeting of a political character was held in the rooms of the Rotunda in this city, which was attended by Mr. Long and other prominent gentlemen, who apparently shared his views on Irish political questions. On that occasion Mr. Long made a speech which was reported at considerable length the next morning

(1) On an *ex parte* motion, the Divisional Court directed notice to be served.

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in the *Irish Times* and *Daily Express*, and which contained the matter in respect of which he and the representatives of these journals are now sought to be made responsible. The reports in the two newspapers seem to be identical as to the language used by Mr. Long, and it is admitted by his counsel that they accurately represent what he said. It would appear from these reports that a large portion of the speech consisted of a hostile criticism upon the Parliamentary attitude of Mr. Bryce, the then Chief Secretary for Ireland, in connexion with his replies to questions addressed to him in the House of Commons on the subject of the alleged boycotting of people named Brady, in the county of Leitrim. The charges against the applicants arose out of acts stated to have been done in furtherance of the boycotting. Mr. Long, in his speech, called the attention of his audience to the matters stated in the address of counsel for the Crown at the trial, and argued that if the Chief Secretary had known what was happening at the time, his attitude in the House of Commons would have been different. The speech throughout assumed the accuracy of the statements of the Crown counsel, and contrasted those statements with the answers given by Mr. Bryce in the House of Commons. Mr. Long then proceeded as follows—and this is the part of his speech on which so much emphasis has been laid, and which, it is contended, is calculated to prejudice the traversers at a future trial. The report, I may say, purports not alone to give the speaker's words, but, by interpolating expressions of assent on the part of the audience, to describe the effects of the speech on them :—

> 'Who were the Bradys? Were they landlords—great owners of property? Were they merely Protestant people, who disagreed with the majority in the neighbourhood in their religious views? There was no allegation of either of these crimes against them. They were people who, by some process of reasoning difficult to understand, came under the ban of the local branch of the United Irish League (boohs). The Bradys sent their two sons—one of them a lad of sixteen—miles off to get provisions. They got provisions, and started on their homeward journey in a donkey-cart. What did they find, according to counsel's statement? When they got to Dromahaire, they were met by 300 or 400 people, who waved their sticks and called on the police to turn back the Bradys or they would be murdered. The police, being a small body of men, protected the Bradys to the best of their ability, and took them to

the police barrack. But they lost all they had gone to town to secure, and the police were roughly treated. The Judge, in summing up, commented on the awful state of things presented in the fact that these people were told that if they passed through the crowd they would be murdered (hear, hear). The result of this trial was that the jury disagreed (ironical cheers). Here, in Dublin, they could laugh at that; but he said deliberately, it was no laughing matter (hear, hear). Here they knew what it was to live under the British flag and the protection of British law. Could they wonder that such a verdict could be given when it was known how an offence of that kind could be described in the House of Commons by the responsible Minister of the Crown?'

"That speech having been made on the 7th of December, an application was, on the 20th December, 1906, made *ex parte* to this Division by counsel on behalf of the present applicants for a conditional order for an attachment against the same parties who are now before us, grounded upon an affidavit similar to that on which the present motion is based. The application was not granted, as the Court considered that the more proper course was to serve notice of motion, which was accordingly at once done. In the meantime—and this is a matter of the utmost importance in this case—a question was addressed in the House of Commons to the Attorney-General for Ireland upon the subject of the speech, in reply to which the Attorney-General stated that he did not consider the language used would have any effect upon the jurors of the county of Leitrim, and that he did not propose to take any action. That this question was asked and this answer given in the House of Commons has been admitted by counsel on both sides, and the Attorney-General's words have been most strongly relied on, as showing that no real prejudice was excited against the applicants by Mr. Long's speech. The Attorney-General's reply is one of supreme moment, when it is remembered that the present motion has been instituted, not by him, but by the traversers, and that he has taken no action whatever in connexion with the speech.

"The application to us is supported by an affidavit made by all the accused persons, in which they say that the two newspapers circulate largely in the county of Leitrim amongst the jurors who will constitute the panel from which the jurors to try them will be drawn; that they believe the speech was

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intended and calculated to influence the jurors to find a verdict against them, and to disparage and condemn the jury who had already disagreed; and they further say that Mr. Long's great position as former Chief Secretary for Ireland, and Member of Parliament for the county of Dublin, adds additional weight to his words.

"To oppose the motion Mr. Long and the representatives of the newspapers have made affidavits. The position which Mr. Long, in his affidavit, takes up is this—He says his speech was a political one; that his only object was to develop his complaint that the Chief Secretary was in the habit, owing to inaccurate or incomplete information, of minimising acts of intimidation notoriously rife in certain parts of Ireland; that the whole point he was endeavouring to make was, to show that the action of the jury was neither surprising nor unreasonable, having regard to the way in which occurrences of the kind were thus minimised in the House of Commons; that neither directly nor indirectly did he refer to any of the traversers, nor suggest that evidence had been given tending to establish their guilt; and that he had no intention, by anything he said in his speech, to influence the jurors, or to condemn or disparage the action of the former jury, or to convey that the charges against the traversers were true or to assume or suggest their guilt. But I consider the most important statement contained in the affidavit to be this—that at the time he made the speech he had not even present to his mind the possibility of the case being tried again, and that he honestly believed he was entitled to refer to the statements made in open Court at the trial in the address of the Crown counsel and by the presiding Judge, as reported in the Press. He added, that if he had said anything which could be considered as calculated in the very slightest degree to prejudice any future trial of the case, he could only say that nothing was farther from his intention. The affidavit concluded with the assertion of Mr. Long's belief, that this application had been made against him as a mere political move, and not for the redress of any real or *bona fide* grievance.

"The affidavit of Mr. Locker, editor of the *Irish Times*; of Mr. Hall, secretary of the *Irish Times, Limited*, and of Lord Ardilaun, the proprietor of the *Daily Express*, are to the effect that no

comments on the portion of the speech complained of were made in these papers, and that the speech was published in the ordinary course of business, without any intention of prejudicing the trial, or of influencing public opinion against the traversers, or of disparaging or condemning the jury that had disagreed. Lord Ardilaun and his editor, Mr. M'Peake, further stated that they were both absent from Ireland when the speech was published.

"With reference to Mr. Hall, the secretary of the *Irish Times, Limited*, counsel for the traversers stated at the Bar that they asked for no ruling against him."

Moriarty, K.C. (with him *H. MacDermot*), for the applicants.

The Right Hon. J. H. Campbell, K.C., and *Henry, K.C.* (with them *John Russell*), for Mr. Long.

Gordon, K.C. (with him *Ronan, K.C.*, and *J. E. Healy*), for Messrs. Locker and Hall.

Matheson, K.C., and *Chambers, K.C.* (with them *Gerald FitzGibbon*), for Lord Ardilaun and Mr. M'Peake.

MacDermot, in reply.

The arguments sufficiently appear from the judgments.

The following cases were referred to:—*The King* v. *The Freeman's Journal* (1); *Weir's Estate* (2); *R.* v. *Castro* (3); *O'Doherty's Case* (4); *R.* v. *Parke* (5); *Sheehy* v. *The Freeman's Journal* (6); *R.* v. *Payne* (7); *Hunt* v. *Clarke* (8); *Pontefract Election Petition* (9); *Labouchere's Case* (*Kensit* v. *Evening News*) (10); *Plating Co.* v. *Farquharson* (11).

(1) [1902] 2 I. R. 82.
(2) 2 New Ir. Jur. 201.
(3) L. R. 9 Q. B. 219.
(4) 5 Cox, 348.
(5) [1903] 2 K. B. 432.
(6) 26 I. L. T. R. 47.
(7) [1896] 1 Q. B. 577.
(8) 37 W. R. 724.
(9) 9 T. L. R. 430.
(10) 18 T. L. R. 208.
(11) 17 Ch. D. 49.

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KENNY, J.:—

After stating the facts as above—

These being the circumstances under which this case comes before us, I proceed to consider the application of the law of contempt of Court, as bearing upon them. But before doing so, I wish to deal with the charge made by Mr. Long in his affidavit, that this application has been made merely with a political object; in other words, that it is not a *bona fide* application by men who regard the speech as one likely to prejudicially affect them at a future trial. The affidavit bases that charge on two matters—the one, of alleged delay in coming to the Court; the other, that the motion was instigated by an article in the Dublin *Evening Telegraph*. In my opinion, the charge cannot be sustained on the ground of delay. The traversers seem to me to have come to the Court at a reasonably early date, having regard to the difficulties which may have presented themselves in obtaining either a joint affidavit from them all or a separate affidavit from each. The interval that elapsed between the 8th December, when the speech was published, and the 20th December, when the application for the conditional order was made, does not suggest to my mind that there was any undue delay. As to the second ground, we could not possibly admit as evidence in the case the copy of the *Evening Telegraph* which was relied upon,—and, when tendered, it was accordingly rejected. The grounds thus relied upon in the affidavit for the assertion that this was merely a political move entirely fail. But another element was presented at the Bar, which was suggested as showing that this application was conceived with an indirect object. Counsel for the applicants, in opening the motion, stated that no other journal in Dublin, except the two which are here impeached, and which are supposed to be in sympathy with Mr. Long's political opinions, published the objectionable portion of the speech. That statement was at once emphatically denied by counsel for Mr. Long, who offered the Court a copy of the *Freeman's Journal*, in which, he alleged, the speech would be found. The traversers' counsel, however, declined to admit it in evidence, as it had not been referred to in any affidavit in the case; and we upheld his

objection. The matter, therefore, rests merely on counsel's assertions, and we have no evidence, one way or the other, upon which we could act; but, speaking for myself, I may say this, that if it had been proved that the *Freeman's Journal* was as deeply implicated as the other newspapers in the publication of this portion of the speech, it would be a matter for grave consideration whether such action did not indicate that the advisers of this application had more at heart an attack upon a politician and journals of a certain shade of politics, than the assertion of the right of fair and free trial.

This element being disposed of, the matter stands thus. There is a pending criminal case in which, at the first trial, the jury have disagreed, and in which the accused parties are likely to be put upon their trial again at the coming Spring Assizes. Mr. Long makes a speech, commenting on the disagreement of the jury, and seeks to justify his action by stating that he had no intention whatever of thereby prejudicing the second trial, and that the possibility of there being a second trial was never present to his mind when he made the speech. In these circumstances two questions present themselves,—the one, has the speech, as reported, a tendency to prejudice and excite prejudice against the traversers? If, on the mere reading of it and without considering whether in the particular circumstances of the case it will really have that effect, the Court be of opinion that it is *calculated* to produce it, a contempt of Court, which may be either a trivial or a serious one, is committed. If the Court thinks there has been a contempt, the other question is, whether the contempt is of so serious a character as to call for the intervention of the Court. On the first question, neither the law nor its application, in my opinion, presents any difficulty. To constitute a contempt, it is sufficient if the Court arrives at the conclusion that the language used has a *tendency* to prejudice the trial. The *possible* effect of the language is all that the Court looks to. The law on both the questions I have mentioned has received no more explicit or clearer exposition than in the judgments of Cotton and Fry, L.JJ., in *Hunt* v. *Clarke* (1), where comments were made on a

(1) 58 L. J., Q. B. 490; 37 W. R. 724.

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pending case to the prejudice, as alleged, of one of the defendants. On a motion to commit for contempt, Mathew and Grantham, JJ., had held that the language used was not calculated to prejudice the trial, and refused the motion with costs. In the Court of Appeal, Cotton, L.J., in giving judgment, said that there were two distinct questions for decision, viz. :—(1) Was there any contempt? and (2) If there was, was it such a contempt as would require or justify the Court in making an order against the respondent. In dealing with the first of those questions, he adopts Lord Hardwicke's observation that there may be a contempt of Court in "prejudicing mankind against persons before the cause is heard." He goes on to add that any observations that *tend* in any way to prejudice the parties, or any discussion on the rights of a case, or on the evidence to be given while the trial is pending, would be a serious attempt to interfere with the administration of justice, but that it was not necessary that the Court should come to the conclusion that a judge or a jury *would* be prejudiced ;— if it were *calculated* to prejudice the proper trial, that would be a contempt. In that case the three Lords Justices before whom it came disagreed with the Court below as to the comments not amounting to a contempt. They held that the words did *tend* to prejudice the trial, and that a contempt was committed, but they considered there was no such fear of any such interference with the due conduct of the action as to justify the Court in making the order asked for,—and the appeal was dismissed. I need only refer to one other case, that of *The Queen* v. *Payne* (1), which contains a judgment of the late Lord Russell. In discharging a conditional order for an attachment, the Chief Justice says: "Every libel on a person about to be tried is not necessarily a contempt of Court, but the applicant must show that something has been published which is either clearly intended, or at least *calculated*, to prejudice a trial which is pending."

There can, therefore, be no doubt, in my opinion, that, apart from the question of prejudice *in fact*, we have in the first place to consider the meaning of the language used by Mr. Long and its natural tendency, and, regarding it from that stand-point, it

(1) [1896] 1 Q. B. at p. 580.

seems to me impossible not to come to the conclusion that it was in substance an adverse comment on the failure of the jury to convict. To put it in very plain language, it conveyed that but for the action of the Chief Secretary for Ireland there would have been a conviction in the case, and, furthermore, that such a conviction would have been right. No matter by whom such language was uttered, the tendency of it must be, in my opinion, to create in the minds of any impartial persons who heard or read the speech, a certain amount of prejudice against the accused. If I think it capable of having that effect, as distinct from my being satisfied as a matter of fact that such effect is, in the circumstances, likely to be produced, the authorities are to my mind clear that a contempt was committed. I am of opinion that the speech was capable of having that effect, and that, in that sense, it constituted a contempt.

But is the contempt of so serious a character as, in the circumstances disclosed before us, to call for the exercise of the very special and summary jurisdiction vested in this Court? If I were satisfied that the speech was made with a view of prejudicing the pending trial, or, apart from *express* intention, if the language was uttered with full consciousness that the men were to undergo another trial, I would have no hesitation in being a party to an order exercising the summary powers of this Court. But the facts here are very peculiar, and I am much influenced by the leaning of the Courts in the more recent cases of alleged contempt to discourage applications where, notwithstanding the *prima facie* tendency of the language, there was no real prejudice created, or no real case made for the interference of the Court. In the *Plating Company* v. *Farquharson* (1) the Master of the Rolls, Sir George Jessel, lays it down that "unless the Court is satisfied that the publication is a contempt which interferes with the course of justice, of course the Court ought not to interfere"; and he further observes that the jurisdiction, being arbitrary and unlimited, should be most jealously and carefully watched, and exercised with the greatest reluctance and the greatest anxiety. Again, in *R.* v. *Payne* (2), to which I have already referred, Lord

(1) 17 Ch. D. 49, at p. 55. (2) [1896] 1 Q. B. 577.

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Russell, in his judgment, declares that, in his opinion, the Courts in some instances have gone too far. In the same case, Wright, J., adds that in order to justify an application to the Court the publication must be calculated *really* to interfere with a fair trial, and if it were found to be likely to do so, the further question would arise whether under the circumstances of the case the jurisdiction ought to be exercised, "not so much for punishment as for preventing similar conduct in the future." The same principle was adopted and acted upon in *The King* v. *The Freeman's Journal* (1). Indeed, so strongly do the Courts disapprove of motions to commit when there is no real case for committal, that in the *Plating Company* v. *Farquharson* (2), James, L.J., characterizes such motions "as a contempt of Court in themselves," and in the case of the *Pontefract Election Petition* (3), Cave, J., says that some of the applications grounded on supposed contempt, "have really tended to bring the doctrine itself into contempt."

These are decisions of the greatest weight and authority, establishing, as they do, that unless in cases where a prejudice is, as a matter of *fact*, likely to be created, the Court ought not to act. A case which I see reported in the public Press of Monday last, before the King's Bench Division, in London, is a striking illustration of a refusal to take notice of what, from the language that is reported to have been used by the presiding judge, was regarded as a very glaring contempt of Court. The impugned matter was contained in a speech made by a Cabinet Minister, Mr. Burns, M.P., in which he was alleged to have made statements calculated to prejudice the fair trial of certain pending actions. Darling, J., if he be rightly reported, seems to have characterized the speech as one of extraordinary indiscretion and impropriety, "showing a very slight regard for the administration of justice by the Courts of the King," yet he considered that the very violence and grotesqueness—as he puts it—of the speech would prevent its having the effect of influencing the jurors,—and the application for committal was on that ground refused. Phillimore, J., who took part in the judgment, is also reported as

(1) [1902] 2 I. R. 82. (2) 17 Ch. D. 49. (3) 9 T. L. R. at p. 431.

having added that "the world had gone mad on the doctrine of contempt of Court, and the doctrine ought not to be extended."

Now, if, in the words of Lord Morris, in the House of Lords (1), "committal for contempt of Court is a weapon to be used sparingly," is there in the case before us such a probable interference with the pending trial as to require this Court to make an order against the respondents? It is important to observe that the object of the jurisdiction is preventive—to deter persons from a repetition of the objectionable comments. Punishment—unless as a deterrent—is not the object. Will the traversers be really prejudiced? The person who, with his wide sources of information, should have the fullest means of knowledge on this subject is the first Law Officer of the Crown in Ireland, and he declares that the speech, in his opinion, will have no effect whatever on those who will be on the Leitrim jury panel. This is a very deliberate statement made by an Attorney-General, whose plain duty it would have been to take action in the matter if the traversers were in the slightest degree likely to be injuriously affected. The highest obligation rests on him to see, not alone in the interests of the Crown, which are those of the community at large, but in those of the accused persons, that a fair and unprejudiced trial is obtained. It is clear to my mind that the Attorney-General is satisfied that no harm whatever had been done, and, therefore, he refuses to move, and has not moved at all in the matter.

But apart from the position taken by the Attorney-General, it seems to me that there is another consideration of great weight, having regard to some former decisions of this Court. Mr. Long positively denies that he had any intention of prejudicing the trial, and I do not think that Mr. Moriarty pressed his argument to the extent of asserting that he had. I certainly, on his affidavit, acquit him of it, though I cannot and do not in any way condone his lack of judgment in referring at all to what, if he had given the matter a little thought, must have shown him was a pending case. Having no intention, as he says, of prejudicing the traversers, he declares that he had not even present to his

(1) [1899] App. Cas. 561.

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mind when he made the speech the possibility of the case being tried again. Although on the question as to whether the speech, as a mere matter of construction, had a tendency to create prejudice we would not be at liberty to have regard to motives and intentions, they become very important when the Court is asked to put in force its powers. If the Court be satisfied there was no *mens rea*, no consciousness of inflicting a moral or legal wrong on third parties, and no probable danger of a repetition of the act, it ought not, in my opinion, to exercise the exceptional jurisdiction which is here invoked. I think it will be found that this principle has been generally acted upon. In *R.* v. *O'Doherty* (1), where the comments on a pending trial after the disagreement of a jury were of a very extreme character, the Court, while expressing the opinion that there had been a gross contempt, went no further, because the implicated party made the somewhat peculiar case that no warning against comments had been given. But the most recent case that serves as an illustration of the proposition is one in this Court, already referred to, *The King* v. *The Freeman's Journal*, generally known as *M'Hugh's Case* (2). The article which was the subject-matter of the motion there was one as to the impropriety of which there could be no second opinion. There had been a disagreement of a jury in a criminal trial, and not alone did the article contain very gross reflections upon the Judge who presided at the trial, but it stigmatized the prosecution as "preposterous," and entirely misrepresented the nature of the issue. The Attorney-General, on behalf of the Crown, applied for an attachment, yet although the case was one of what, I may call, real and intentional contempt, the Court accepted from the representatives of the *Freeman's Journal* a statement that they believed when the jury disagreed the prosecution was at an end,—and consequently abstained from imposing a penalty. The ground for so doing was, in the words of Gibson, J., inadvertence on the part of the impugned parties. Unless we were to say that we disapprove of the action of this Court in these two cases, we would, in my judgment, be running counter to them if we inflicted a penalty in

(1) 5 Cox, 348. (2) [1902] 2 I. R. 82.

the case before us. The terms of the speech we have to deal with pale into insignificance when compared with the language which constituted a contempt in the two cases I have mentioned, yet the Court was careful to look into the question of intention. In each case it must be attributed to the parties that, while legally they had no right to think there was no restriction on their right to comment, they were not conscious of the restriction,—in other words, the restriction was not present to their minds. How do these cases differ from the present? The possibility of a second trial was not, as he swears, present to Mr. Long's mind when he made his speech, and it seems to me that his action was quite as inadvertent as that of the editors in those cases, and,—to say the least,—he was quite as unconscious of doing a wrong as they were held to be.

While, therefore, I condemn most strongly comments on a case that is *sub judice*, and also consider as a matter of construction that language such as that used in Mr. Long's speech is *prima facie* a contempt of Court, I am convinced that, in the words of Cotton, L.J., there is no such interference or any such fear of any interference with the due conduct of the trial or any such prejudice to the applicants as to justify this Court in exercising its very special authority. That was evidently the well-considered opinion of the Attorney-General for Ireland, representing the Crown,—an opinion that presumably was known to the applicants before they initiated the present application. I think they ought to have been satisfied with it, and this motion should be refused.

As to costs, I think we ought to follow the order which the Court of Appeal in *Hunt* v. *Clarke* (1) considered would have been the correct one in order to mark their disapprobation of observations of the sort that have been under discussion before us, and allow each of the respondent parties to bear his own costs.

MADDEN, J.:—

I desire to say for myself that I fully accept Mr. Long's assurance that a second trial of the case to which he referred was not present to his mind at the time when he made his speech, and

(1) 37 W. R. 724.

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that, so far as intention is concerned, he did not mean to suggest that any of the accused persons were guilty of the crime for which they were prosecuted. But we are concerned, in the first instance, with what Mr. Long actually said, and then with the probable effect of his words; and neither of these inquiries can be determined by our belief as to the recollection or intention present to the mind of the speaker. I do not propose to analyse in detail either Mr. Long's speech or the explanatory affidavit which he has made. I shall only deal with broad and undisputed facts. The speech was made at a political meeting. Mr. Long complained "that the Chief Secretary was in the habit, owing to inaccurate information, of minimising acts of intimidation which are notoriously rife in certain parts of Ireland." As an "object lesson" the speaker selected the case of one Brady, which had been made the subject of questions in the House of Commons, and of a criminal prosecution at the Winter Assizes, a report of which case had appeared in the *Irish Times* on the day of the meeting. The trial had resulted in a disagreement of the jury, and the accused awaited their trial at the next Assizes for the county of Leitrim. Now, whatever may have been the recollection of the speaker, it is plain that he presented this abortive trial to his audience as a miscarriage of justice; and in making excuses for the jurors, he conveyed the opinion that those who had refused to convict had failed in the discharge of their duty as jurors.

There can be no doubt that Mr. Long, in commenting upon a pending prosecution, was led into what has always been regarded as contempt of Court. Inadvertently, as I believe, he failed in obedience to a salutary rule which was thus clearly stated by Cockburn, C.J.:—"This Court has always held that comment made on a criminal trial or other proceedings when pending, is an offence against the administration of justice, and a contempt of this Court."

But this case is not disposed of, or the action of the Court determined, by the answer to the inquiry whether Mr. Long's comments on a pending prosecution amounted to a contempt of Court For, it is not every contempt of Court which justifies an application to the summary jurisdiction inherent in the Court. The Court, in exercising this jurisdiction, does not discharge the

academic function of criticising what has been written or spoken, and adjudging whether it does or does not exceed the limits prescribed by law. It exercises its powers for the practical purpose of safeguarding the administration of the law, and preventing the publication of matter which would, in the words of Lord Blackburn, "interfere with the due course of justice" (1). Each of the reported cases to which we have referred depends on its particular facts; but underlying them all will be found the general principle that the danger to the administration of justice which will justify an application to the Court must be a real and not an imaginary one; and a growing tendency is clearly traceable throughout the cases, up to and including the most recent decision, to discourage a class of applications which are, in their nature, eminently liable to abuse, from indirect motives, personal or political, when such applications are based merely upon a consideration of the words spoken or written, without evidence of a real danger to the administration of justice.

The test to be applied when an appeal is made to the summary jurisdiction of this Court was laid down in clear language by the Court of Queen's Bench in England, consisting of Lord Russell, C.J., and Wright, J. The following passage from the judgment of Wright, J., has been approved and adopted in subsequent cases, amongst others in *The King* v. *Freeman's Journal* in this Court (2) :—"I agree with all the Lord Chief Justice has said, and I only wish to add that, in my opinion, in order to justify an application to the Court, the publication complained of must be calculated really to interfere with a fair trial; and if this is not the case, the question does not arise whether the publication is so objectionable in its terms as to call for the interference of the Court." That is to say, the Court will not interfere by an exercise of its summary jurisdiction, even in the case of a publication objectionable in its terms, unless it is shown to be not only objectionable but calculated really to interfere with the course of justice. The rule so laid down is in exact accord with the principle upon which the English Court of Appeal acted in a case to which I shall presently refer.

(1) *Skipworth's Case*, L. R. 9 Q. B. 230, (2) [1902] 2 I. R. 82.

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Tried by this rule, the cases which have come before Courts of Justice divide themselves into several classes. There are those in which the Court have thought it necessary to impose a substantial penalty. Of this class, the case in which Cockburn, C.J., delivered the judgment from which I have quoted is a typical instance. A prosecution for perjury had been directed by the presiding Judge against the plaintiff in a civil action, Thomas Castro, and a day had been fixed for the trial. A series of public meetings had been organized in his interest by some persons, including Mr. Onslow and Mr. Whalley, in the course of which violent speeches were delivered, denouncing in terms of opprobrium the tribunal by which the civil action had been tried, and asserting the innocence of the accused, the establishment of which, in the opinion of the Court, was the special purpose for which the meetings were held and the speeches delivered.

This is an example of the case in which intervention of the Court is plainly needed. There is another class of cases at the opposite extreme, in which Mr. Long asks us to hold that the application before us should be included—cases in which the authority of the Court is invoked, not really in the interests of a litigant or of the administration of justice, but for some indirect purpose. An attempt to abuse the process of the Court is in itself a contempt of Court, and if the evidence before us had been sufficient to sustain Mr. Long's allegation that the application against him was a mere political move, it ought to be refused with costs. But such a charge cannot be supported by assertion and suggestion, and sufficient proof in support of it is wanting. Certain newspapers have been mentioned, but they were not given in evidence, and I leave them out of consideration. The attitude taken up by the Attorney-General is important with reference to another branch of this case. But I cannot regard his refusal to interfere as sufficient in itself to establish the existence of indirect motives on the part of the accused. Neither do I think that there was any unreasonable delay in applying to this Court.

Placing out of consideration both these classes of cases, I proceed to consider the application to the facts of the present case of the test prescribed by the authorities to which I have referred: what is the effect, if any, which the passage complained of in

Mr. Long's speech is really calculated to produce upon the administration of justice—that is to say, upon the trial of the applicants at the next Spring Assizes before a jury of the county of Leitrim?

In considering questions of this kind, regard is always had to the time, place, and occasion of the speech complained of. I leave out of consideration the intention of the speaker, for an utterance, however unintentional, which was really calculated to affect the administration of justice would justify an appeal to the jurisdiction of this Court, and intention is relevant only on the question of punishment. Mr. Long's speech was delivered on the 7th December, at a political meeting in Dublin, at which speeches were made, the reports of which, occupying several pages of the newspapers, are in evidence. The abortive trial on which he commented took place at the Winter Assizes for 1906, in the county of Sligo. The trial of the accused will take place in the month of March, 1907, in the county of Leitrim, before jurors taken from a panel which was not in existence when the speech was delivered. Dealing with the reality of things, I cannot bring myself to believe that the report of what was said at that meeting is at all likely to influence the action, even if it should remain in the memory, of a single juror summoned to try the case at the next Assizes in Carrick-on-Shannon. We must have regard to the effect which the speech was in itself calculated to produce, leaving out of consideration the publicity which has been given to it by the present proceedings. But, even if the probabilities of the case had presented themselves to my mind in a different light, I should hesitate to act on my own opinion in opposition to the view expressed by the Attorney-General in the House of Commons. The Attorney-General for Ireland occupies a different position from his English colleague. He is the member of the Government who is responsible to Parliament in all matters connected with criminal prosecutions in Ireland, and in answering questions addressed to him in the House, he has at his command all the various sources of information in the possession of the Irish Government. The mere fact of the non-intervention of the Attorney-General would not be in itself very significant, for the circumstances of the case might not have been brought under his attention. In the present case this was done in the most pointed

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manner by a question addressed to him in the House of Commons, and I should require some substantial grounds before founding my judicial action upon a conclusion different from that at which he arrived. But his view of the case presents itself to my mind as eminently reasonable, and adopting it, the conclusion necessarily follows, so far as my judgment is concerned, that no sufficient grounds have been established for any action on the part of the Court. I adopt, as an expression of my view of the case, the words of Cotton, L.J., in *Hunt* v. *Clarke* (1)—"I cannot see any such fear of serious interference with the course of justice, or prejudice to the defendant, as to justify the Court by interfering by this summary and arbitrary process."

The order in the present case should, in my opinion, be the same as that made by the Court of Appeal in *Hunt* v. *Clarke* (1). There, as here, the publication, taken in itself, amounted to a contempt of Court; but the Judges, Cotton, Fry, and Lopes, L.JJ., made an order refusing the application, but without costs.

PALLES, C.B.:—

I feel obliged to differ from the conclusion at which my brethren have arrived. I am of opinion that there should be an adjudication that Mr. Long and the proprietors of the *Daily Express* and the *Irish Times* are guilty of contempt of Court, and that Mr. Long should be subjected to a substantial pecuniary penalty, but I do not think a penalty should be inflicted upon the newspapers.

The meeting of the 7th December was held for the purpose of promoting the Unionist cause in Ireland, and was intended by its promoters to be, and in fact was, one of an extremely influential character. It was intended that it should appeal, not only to the large audience which it was contemplated would be actually present, but also, through the medium of the Press, to all members of the Unionist party in Ireland. To increase its influence, to add weight to the pronouncements of its speakers, it was attended by four members of the late Government, each of whom was a person who, by reason of his character, position, and unquestioned ability, was entitled to carry, and did carry, great weight among the

(1) 37 W. R. at p. 724.

members of the party. Of those ex-Ministers, two had attained Cabinet rank; the other two, at the time of the resignation of the late Government, were Law Officers of the Crown—the Attorney-General for Ireland and the Solicitor-General for England. The presence of these gentlemen was, in my opinion, calculated to induce the belief amongst the members of their party that the matters referred to by the speakers were of a character that might legally be appealed to and insisted upon.

Again, the meeting was not one hurriedly called together, nor was its object an ephemeral or unenduring one. It appears to have been arranged with deliberation, with a view of, *inter alia*, influencing future elections, of which at present there is no near prospect. I rely upon that, as showing that we are not justified in arriving at a conclusion that, because the second trial of these persons will not take place till the month of March, we should, therefore, judicially hold that the speech will not have any influence at that trial.

Having regard to all these circumstances, it appears to me that the statement of Mr. Long as to the boycotting of the Bradys, and the course which ought to have been taken by the jury, was one eminently authoritative; one likely to be deemed by those to whom it was addressed as deliberately made, with all the responsibility of one in his great position, and, consequently, one well calculated to impress those to whom it was addressed with a belief in its truth and accuracy. But of all statements made there, those which, in my opinion, were calculated to make the deepest impression and carry the greatest weight, were those of the gentleman who, for a period of nine months, terminating in the December previous to that meeting, had been responsible for the government of Ireland as Chief Secretary with Cabinet rank; and were there one subject-matter upon which, more than any other, his statements would be more impressive, and come more home to Irish Unionists, it was that of boycotting, in reference to which, having regard to our Crimes Act, a peculiarly responsible duty is thrown upon the Irish Chief Secretary, especially when he is a member of the Cabinet, because it is his duty, if there are any cases of boycotting, to bring them before the Cabinet, with a view to the consideration of the proclamation of the place in question under the Crimes Act.

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Such being the character of the meeting, and the position in it of Mr. Long, it is necessary to refer with some accuracy to the action of the jury to whom Mr. Long referred when, to use his own words, he was endeavouring to show "that it was neither surprising nor unreasonable." He says he quoted from the *Irish Times* of the 6th December, the accuracy of which, he says, has been in no way questioned. Now, I take that publication. It appears from it that the prisoners who are applicants here were indicted for riot and unlawful assembly, and that the leading counsel for the Crown stated that "it would be proved that each of the defendants had committed acts constituting the offence of unlawful assembly, both in regard to the objects of their assembly"—that is, for the purpose of carrying out boycotting methods—"and to the mode in which they did assemble."

The case for the Crown was that one Thomas Brady had been boycotted for many months, and that one of the forms in which that boycotting was carried out was by not allowing him or his family to obtain the necessaries of life; that the shopkeepers in the towns within a radius of twenty miles being afraid to supply the Bradys with these necessaries, two young men of the family, one aged nineteen and the other sixteen, started on the 7th July, early in the morning, with their donkey and cart, to get some meal and other necessaries at Dromahaire, a distance of twenty miles away, to which town they were escorted by police; that on their return journey, still escorted by the police, they were leaving a town called Dromkeeran, when a crowd of about 600 people met them, waved their sticks, and called on the police to turn back with the Bradys, or there would be murder; that the goods which had been purchased at Dromahaire were taken out of the cart, and were destroyed, but that the police succeeded in getting the Bradys into the police barrack.

I need hardly say that if that statement for the Crown was sustained by the evidence, it would have been very hard to say that the assembly was not an illegal one, and that the persons who were parties to it were not guilty of the crime charged in the indictment. In the report in the *Irish Times* it is stated that evidence was given identifying three of the prisoners with this tumultuous crowd, but I assume that evidence was also given

identifying the others, as otherwise the learned Judge (Mr. Justice Gibson) would have directed the acquittal of the others. No witnesses were called for the defence. The counsel for the prisoners urged that the evidence of the witnesses could not be relied on; and argued that if the crowd was of the riotous character stated in the evidence, it was strange that nobody had been injured by their action, except the head-constable, whose fall, they said, was the result of a trip from behind. He also stated that although the jury might bring in a verdict against the prisoners, they could not deprive them of the consciousness of having done what they believed to be right, and of what would be looked upon by their fellow-countrymen with admiration. Mr. Mac Dermot, their counsel, states, and of course I accept it, that the acts that he referred to were not those referred to in the evidence of the witnesses, but some other acts to which he admitted the prisoners had been parties.

Mr. Justice Gibson, in summing up, said that if the crowd met for the purpose of preventing those boycotted persons from bringing provisions from Dromahaire, it would have been an unlawful assembly, and that if the prisoners took part in that assembly, the jury should find for the Crown; but that if that was not the intention, and if the crowd met for some other purpose, not disclosed, they should find for the prisoners. He added—what all will agree in—"Was it not an awful state of affairs that if a man had gone forty miles to get his food, he was to be told that if he passed on the highway through a crowd he might be murdered? which, of course, would depend upon the truth of the evidence which had been given; that if that was not an unlawful assembly, he did not know what an unlawful assembly was; and that it would be a very serious thing if the jury should either set aside the law on the one hand, or do injustice on the other."

Plainly, upon the evidence, the question to be determined was, Was the assembly of the nature which the learned counsel for the prosecution had stated in his opening statement that it was? It appears from the report that the jury, after half an hour's consultation, returned into Court, and said they could not agree. They were then discharged; and it also appears by the report

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that the accused were put back, the same bail as before being accepted.

It is clear from this report that the main, if not the only, defence was that the evidence as to the nature and conduct of the crowd was such as the jury ought not to act upon. It appears that upon a previous occasion, in the House of Commons, the Chief Secretary to the Lord Lieutenant had been asked if it were true that Brady was in danger of his life, and whether police had to be quartered in his house for his protection. The Chief Secretary, answering, said that there was no reason to believe that his life was in danger, but that it was necessary to give him police protection, in order to prevent intimidation and possible rough treatment.

In the portion of the speech of Mr. Long which is complained of, after stating the question put in the House of Commons, and the reply to it, he proceeded to refer to the facts of the case as they appeared in the report in the *Irish Times*, and continued thus:

> "The Judge, in summing up, commented on the awful state of things presented in the fact that these people were told that if they passed through the crowd they would be murdered."

That is, assuming that that evidence was true. He then said,

> "The result of this trial was that the jury disagreed."

It is stated in the report that at this point there were ironical cheers:—

> "Here in Dublin" (continued Mr. Long) "they could laugh at that; but he said deliberately, it was no laughing matter. Here they knew what it was to live under the British flag and the protection of British law. Could they wonder that such a verdict should be given, when it was known how an offence of that kind could be described in the House of Commons by a responsible minister of the Crown?"

I have considered the entire of this speech more than once with the utmost attention; and I am utterly unable to arrive at any other conclusion than that it means that the disagreement of the jury was wrong, and that the prisoners ought to have been convicted; that they had been guilty of criminal acts against the Bradys which entitled them (the Bradys) to the protection against

them of British law—protection which they had not received. It was, first, an imputation upon the jury, that they disagreed where they ought to have convicted; it was, secondly, an imputation against the prisoners, that they had committed the acts with which they were charged. Mr. Long's explanation of those words seems to me to make it quite clear that not only was this the effect of the words he used, but that it was the effect which *he intended* the words should have. His statement is:—

> "I say that the whole point I was endeavouring to make was to show that the action of the jury was neither surprising nor unreasonable, having regard to the way in which occurrences of the kind then being investigated had been minimised by the Chief Secretary for Ireland, in reply to questions in the House of Commons, owing to the failure of those in possession of the full facts to communicate them to the Chief Secretary, whose duty it was to give to the House of Commons, in reply to such questions, the fullest information available."

His point was, that the action of the jury was neither surprising nor unreasonable, because in substance it was to be attributed to the Chief Secretary. But, to give any point to this, what he intended to attribute to the Chief Secretary must have been something which he, Mr. Long, deemed to be wrong, *i.e.* not the mere disagreement of the jury, but their disagreement under circumstances in which there ought to have been a conviction. So that, in order to bring an imputation against Mr. Bryce, which was the darling object he had in his mind, he implied, and, indeed, expressed, a direct imputation against the jury, and by so doing he also expressed an imputation against the prisoners—the imputation that they ought to have been convicted.

What is the rule of law on this subject? It is thus stated by Lord Blackburn, in *Skipworth's Case* (1):—

> "When a case is pending, whether it is civil or criminal, in a Court, it ought to be tried in the ordinary course of justice, fairly and impartially. . . . When an action is pending in a Court, and anything is done which has a *tendency* to obstruct the ordinary course of justice, or to prejudice the trial, there is a power given to the Courts, by the exercise of a summary jurisdiction, to deal with and prevent any such matter

(1) L. R. 9 Q. B. 232, 233.

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which should interfere with the due course of justice; and that power has been exercised, I believe, from the earliest times the law has existed."

Has, then, this speech a tendency to prejudice the fair trial of this indictment? It is to be remembered that it will answer this description if it has a tendency to prejudice the mind of even one of the jurors who shall be empanelled on the trial. In Leitrim, as in every other county in Ireland, there are many Unionist gentlemen on the Common Jurors' Book. My opinion is that the speech has not only a tendency to prejudice the fair trial, but that from the person by whom, and the circumstances under which, it was spoken, it cannot have failed to bring home to the mind of every Unionist juror in the county of Leitrim who read it, a belief in the prisoners' guilt; and however conscientious a juror may be, no matter how determined to act solely upon the evidence, we all know that such a belief seriously interferes with the capacity of a juror to try the case in the same manner as he would have done had he never entertained such a belief. It follows that, in my opinion, there is a real, a serious danger, that it will interfere with the fairness of the second trial.

Upon the whole, then, differing as I do from my brethren, I entertain a strong opinion, amounting, I must say, to an absolute conviction, that this speech was a contempt, and, as I must express my own opinion, an aggravated contempt of Court, aggravated by the position of the speaker, and the circumstances under which the speech was delivered.

As to the law applicable to the case, there is no doubt. Actual intention to prejudice is immaterial. I wholly deny that the law of this Court has been that absence of an actual intention to prejudice is to excuse the party from being adjudged guilty of contempt of Court, if the Court arrives at the conclusion which I have arrived at, that there is a real danger that it will affect the trial: or that absence of intention is to excuse the party from punishment. Such a circumstance as that ought, no doubt, to be taken into consideration in considering the nature of the punishment to be awarded, as, for instance, whether it should be imprisonment. I give effect to it in that sense, and am of opinion that our adjudication should be followed, in the case of Mr. Long, by the

infliction, not of imprisonment, but of a substantial pecuniary penalty.

There is no question here as to belief that the proceedings had terminated. Mr. Long makes no such excuse. The fact which was the substratum of his argument was that there had been a disagreement of the jury. This involved the fact that the case continued to be pending, even if he did not observe the last words in the report, " the same bail as before being accepted."

Of course I accept Mr. Long's sworn statement that it was not actually present to his mind, at the moment that he spoke the words, that the case might be tried a second time. But he must have known that the case had not been disposed of; and he should have known, from his experience in the Irish Office as Chief Secretary, that cases of this description hardly ever terminate in Ireland with a disagreement of the jury upon the first trial. I base my judgment on this part of the case upon the fact that he does not pledge his belief that the case would not be tried again. Under these circumstances the refusal of this motion, and the view that has been expressed by my learned brethren who have already given judgment, will, in my opinion, make the present decision the strongest case in the books of refusing an application for an adjudication of contempt of Court.

There are a few matters that were referred to in the argument as to which I had intended to say something; but it has been rendered almost unnecessary by what has been said by my learned brethren, as they have anticipated me in the view I take of almost all those matters, save one, which I deem of very great constitutional importance—I mean the reliance that has been placed upon the statement of the Attorney-General. But, before I refer to that matter, I wish to say that I cannot find any excuse for Mr. Long in the political character of the meeting. This is not the first case we have had which owed its origin to a political meeting; but it is Mr. Long who has brought into politics legal matters that should not have been entered into. It is he, not the applicants, as alleged by his counsel, who intrude with politics into the legal field. Neither am I impressed with the statement that this motion has been instituted for political motives. That has not been proved. The paragraph of Mr. Long's affidavit which

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relied on want of *bona fides* is based on an issue of the *Evening Telegraph*, which we declined to receive in evidence, and on an unsustained allegation of delay. Those circumstances did not, in my mind, throw any obligation upon the applicants to make an affidavit in reply. I desire to say that, had I been their counsel, I should, simply in their interests, have advised the institution of this motion, because I have a strong conviction that if the motion had succeeded, and had there been an adjudication of this Court that there was a danger that the case could not be fairly tried in the county of Leitrim, it would follow that it could not be fairly tried in any county in Ireland, and that the embarrassment to the prosecution would have been so great that there possibly would not have been a second trial, but the Crown would have been obliged to abandon the prosecution. This is one of the possible evil results of the speech.

As to the matter that has been referred to by Mr. Justice Madden, namely, the length of time that must elapse between the date of the speech and the Assizes, which has been relied on as rendering it likely that the speech would, by that time, have been forgotten, I have already stated that I cannot accept that view, in reference to a speech whose consequences, I am satisfied, were intended to continue, and I believe will continue, until the next general election.

As to the cases cited, it is unnecessary to refer to them in detail. One uniform principle pervades them all. That principle is undoubted and admitted. If it be sought to use them, as I regret to find they have been used, as showing that in particular circumstances certain words were held not to be calculated to prejudice the trial, such a use of cases decided upon that ground is an illegitimate use of them. As laid down by Lord Halsbury in *Simmons's Case* (1), and so frequently reiterated by him, with a power all his own, as to have become almost a legal maxim, one case depending on facts—which every one of the cases referred to in the judgments already delivered has been—can never be an authority in another case depending on facts. Where has a case been produced in which a man who had been a Cabinet Minister, who in fact had within twelve months been governing Ireland, at a

(1) [1892] A. C. at p. 208.

meeting surrounded by all that was calculated to induce the belief that everything said or done there was the incarnation of the law, that a man with that tremendous power and position should use it for the purpose of telling his party throughout all Ireland, all of whom were hanging on his words, and willing to act upon them, that these men who were indicted at the last Assizes, and who are to be tried again at the next Assizes, are guilty of the offence with which they are charged? When you talk of cases and of facts, bring me a case in England, Scotland, or Ireland, in which the facts were anything approaching these, and I shall consider its application to the present case.

A statement alleged to have been made by the Attorney-General in his place in Parliament has been relied on by some of my brethren—a statement which has not been proved by affidavit, and of which I do not know the exact purport and meaning. I understand it to amount to this: that poor men were often imprisoned for less than had been done by Mr. Long, but that he himself thought that it would not prejudice the trial. This has been relied upon as part of their *ratio decidendi* by some members of the Court, and has been stated by one of them to be a matter of the highest importance in the case. I am of opinion that such a statement ought not to have been permitted to have been referred to in argument, much less made a substantial part of the *ratio decidendi* of the Court. However, it has been, and as to that I shall say no more than that it is my duty to form my own unbiassed opinion as to the facts and the inferences to be drawn from them, and if I feel myself unable to yield to the opinion expressed by my learned brethren, how could I be expected to be affected by the opinion of the learned Attorney-General, who is not in the position that we are, of absolute impartiality and indifference, but who is identified with and represents the prosecution? We are all aware that Judges are often unable to accept the view of a criminal case put forward by the Crown, even if the Crown prosecutor be the Attorney-General himself. To be told, when an application is made upon the part of prisoners who swear that in their opinion their trial has been prejudiced, and who give us reasons sufficient to induce us to arrive at the conclusion that there are good grounds for that opinion, that we are to take into consideration a statement

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made by the Attorney-General in Parliament, as a political man, for he was speaking in the House of Commons, and does not appear here to oppose this motion—to be told that we should take into consideration a statement that poor men had often been imprisoned for less than had been done by Mr. Long, but that he himself thought it would not prejudice the trial, is going a length that I have never yet known a Court of Justice to go. At all events, I have now stated my view. Of course it will have no effect, as I am in a minority of one, but I fear the result of this decision will be that for the future we never will be able to prevent comments upon proceedings in Courts of Justice by people who have not at the moment the exact facts before their minds. Whether, however, this case involves that change in practice, I am not, and will not be, a party to the change.

As regards the newspapers, the adjudication that they, too, are guilty of contempt, follows as a corollary to what I have said as regards Mr. Long. But although I am of opinion that there was great want of supervision on the part of the editors—in fact, a total abandonment of their duty in that respect—yet, as Mr. Long has admitted the substantial accuracy of the reports, I do not, under all the circumstances, think it necessary that any penalty should be imposed upon them.

LORD O'BRIEN, L.C.J.:—

I regret that our judgment is not unanimous, and that I cannot claim in every respect the concurrence of the Lord Chief Baron, whose opinion I so much respect. However, we have our respective responsibilities. There is no doubt that language, the use of which is much to be deprecated, was employed by Mr. Long on the occasion in question. But the notice of motion with which we have to deal asks us to issue a writ of attachment for that language, and the question for our determination, therefore, is: Are we to do what we are asked to do—to commit Mr. Long to prison? The imposition of a fine is not expressly asked for as an alternative punishment, but what the notice of motion seeks is the committal to prison, not only of Mr. Long, but also of the two editors of the *Irish Times* and *Daily Express* newspapers, which merely published the speech of Mr. Long

without making any comment whatsoever. Though imprisonment only is sought by the notice of motion, I shall, of course, consider whether there ought to be either fine or imprisonment. Before I deal with the main, and what I consider the determining, factor in this case, I would like to say a word with regard to what was so emphatically charged in Mr. Long's affidavit, that the present motion was a *mere* political move. Mr. Campbell, in the course of his vigorous argument in reply to my question as to what evidence there was of this, stated that everyone knew that the motion was a *mere* political move. I said that impressions out of Court, however general, did not suffice; that these impressions, if they existed, should be wholly disregarded by us. Mr. Campbell then referred to the grounds relied upon in Mr. Long's affidavit in support of his assertion that the motion was a *mere* political move. These grounds were that there was delay in the institution of the motion, and that the *Evening Telegraph*, of the 8th December, contained an article suggesting that the motion should be made. I do not think that either of these grounds was established by the evidence. The speech was reported on the 8th of December, and the affidavits to ground the motion were made upon the 19th. There were eight persons put on their trial at Sligo, and it was only reasonable that these persons should be brought together to swear the affidavit upon which the motion was grounded, and it was very reasonable that the affidavit should have been, as it was, settled by counsel. Besides, it appears that the matter was brought forward in the House of Commons in the first instance, and that the Attorney-General, as Mr. Moriarty, counsel for the applicants, not only once but twice informed us, refused to move in the matter, as he was of opinion that the speech made by Mr. Long would not in any way influence the minds of the jurors in the county of Leitrim, where the accused are to be tried, if at all. That was the reason the Attorney-General did not move in the matter, as Mr. Moriarty, as I have said, not only once but twice, informed us, and I refer to this as my Lord Chief Baron seems to think there was no evidence as to the action of the Attorney-General. Surely the repeated assertion of this by the leading counsel for the applicants may be treated as an admission by him.

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I do not think, as I said, there was any real delay. The *Evening Telegraph* and its alleged suggestive article were ruled not to be evidence in the case. I put aside the fact that the *Freeman's Journal*, which everyone knows is identified with the politics of the vast majority of the common jurors of Leitrim, was not made an object of attack. What exercised me personally was this: Why this motion at all? What was its object? The Attorney-General, as I have said, thought that Mr. Long's speech would have no influence with the common jurors of Leitrim. So do I. The Attorney-General—I say so with all deference—is the best informed authority on the subject. He has the best means of ascertaining the impression, if any, likely to be made by Mr. Long's speech in the venue where the trial is to take place—that is to say, in the county of Leitrim. He has all the local authorities to appeal to, and I need not say that I am quite sure that he has a full sense of what is due to his own responsible position; and, let me add here, that I cannot for a moment accept the suggestion that he is to regard an alleged contempt of Court from the mere standpoint of a person who has to prosecute to conviction certain subjects of His Majesty the King. The administration of justice is of the flower of the King's prerogative; the Attorney-General is the Attorney-General of the King, and, as such, in the prosecution of the King's subjects, stands in a quasi-judicial position. His duty, as an honourable man and as a responsible official, was to see fair play to both sides, to the defence as well as to the prosecution. Here we have simply the parties before us. We cannot call to our assistance all the means and machinery and resources of the Government. We have simply the parties before us. We listen to the speeches of counsel, and we are careful not to permit ourselves to be led astray by their perfervid eloquence, of which there was a considerable display in this case. The Attorney-General's action was of no perfunctory character; not, indeed, that in any case I would suggest that he could act in a perfunctory way. With all the sources of information at his command, and the responsibility of his position upon him, his duty to the House of Commons, to the country, to the accused, to the administration of the law, and lastly—which is the sum of all—to himself, he declined to interfere on the ground that what

Mr. Long said would have no effect on the Leitrim jurors who were to try the case.

There is no instance in our books in the whole range of Criminal Law, from the Year Books to the present day, where, on a summary motion of this sort, the Attorney-General having refused to interfere, the Court inflicted punishment either by committal or fine. Not that I say for one moment that the action of the Attorney-General can take away from us what is at once our prerogative and duty—our special prerogative and exclusive duty—independently of any opinion the Attorney-General may entertain, of deciding for ourselves. We cannot, as I more than once pointed out during the argument, make that opinion the ground or a ground of our judgment. I merely say that the fact that the responsible official at the head of the Criminal Law, who has better means of ascertaining the true position than we have, declined to interfere, should give us pause. It should be an added stimulus—if, indeed, that at all was wanted—to consider the case with great and grave deliberation. This is the view, as I understood, of my brothers Madden and Kenny. It is most certainly mine. I have used the expression "the true position." By the true position I do not, of course, mean that the Attorney-General can determine more adequately than this Court the true construction of the language used, but I think he has more adequate means of ascertaining the effect it would be likely to have in any particular venue. To recur, however, to the allegation that this motion was a *mere* political move, the object of a motion such as this is, in the eye of the law, of a protective and preventive character. No doubt punishment is inflicted to prevent the repetition of language which may be calculated to prejudice the fair trial of a prosecution or of an action, as the case may be—to guard against any future comment that may be calculated to prejudice.

Now, as regards the newspapers, I desire to point out that at an early stage of the argument, in reply to a question put by me, it was stated that neither the *Irish Times* nor the *Daily Express* had a leading article, sub-leader, or editorial paragraph whatsoever on the impugned paragraph in Mr. Long's speech. In fact, there was no comment whatsoever; there was no evidence whatsoever of intention on the part of Mr. Long to recur to

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the subject. It was not like a case of a continuing advertisement of a prejudicial character. As far as Mr. Long was concerned, the matter originated out of an answer given by Mr. Bryce to Mr. Lonsdale in the House of Commons, and that topic was apparently exhausted. What was the true motive for the institution of this motion? Was not the effect of it to bring Mr. Long's speech before the public in a way that would attract considerable attention and publicity; to give it far more publicity than it originally had; to bring, in fact, the impugned sentences into a glaring light before the public; to focus public attention upon these sentences? Nothing was more calculated to defeat the ostensible object of the motion than the motion itself. No doubt, that in almost every case—indeed, I should say, in every case—the impugned observations acquire a greater degree of publicity by a motion which has for its object the punishment of a person who spoke or published what is complained of; but the peculiarity of this case is that it is obvious—obvious to my mind as it was to the mind of the Attorney-General—that what is impugned here would not in any degree influence the minds of the common jurors of Leitrim. If it had any influence at all, it would be in favour of acquittal. Was all this *bona fide*? Was the motion an honest attempt to subserve the interests of justice? or was it, in truth and fact, a motion run under the name of justice, but being nothing more or less than a *mere* political coup—I emphasize the word *mere*—was it, no matter what name it bore, merely a political contrivance? It is well settled that an application for this summary remedy must be made in the interests of justice. There must be no indirect object. The true object of the motion must be in the interests of justice, and most certainly the interests of politics are not necessarily the interests of justice. It would be much to be deplored if this Court, on a summary motion of this character, was to be permitted to become the mere battle-ground of party. This is not a case like *O'Byrne* v. *Hartington* or *Blunt* v. *Byrne*, where the parties could, of their own motion, issue legal process. This is an appeal to the discretion of the Court for an extraordinary remedy. This question of *mere* political move has exercised me very much, but on the whole, after considerable fluctuation of opinion, I cannot say that an indirect object has been so satisfactorily established that I

would be justified in dealing with the case as if its existence had been clearly and fully established. I say no more. I cannot help, however, saying this, that I feel an uneasy, disquieting misgiving that we may be suffering ourselves to be made the instruments of an ingenious political contrivance. The Irish people are a clever, ingenious people, and many things they do ostensibly seriously are not wholly unrelieved by a touch of humour. A learned English judge said the other day in London that people had gone mad about these so-called contempts of Court; but I own that whatever the true description of this motion may be, I do not think insanity is its predominant characteristic.

But I now come to what I consider the determining factor in this case. My brothers Madden and Kenny have dealt at length with Mr. Long's speech. No doubt that he referred at some length to the treatment of the man Brady who, he stated, was boycotted, and was, as he stated, in great danger from the action of a certain crowd. He referred to the elements which constituted what I styled during the argument the *corpus delicti*—that is to say, the elements which constituted an offence; but he made no special reference whatsoever to the accused, either by name or description—in fact, the word "accused" or the word "defendants" does not appear in his speech. He did not say that the applicants had any participation in the offence. No doubt he did say that the jury disagreed, and when his audience laughed ironically, he said it was no laughing matter, that it was very well for people in Dublin to laugh, that they were under the protection of British law. It will be seen that he said this on the spur of the moment. What he said was provoked by the ironical cheers of the audience. Mr. Long, in the second paragraph of his affidavit, states:—"I absolutely disclaim and repudiate the suggestion that I intended by anything in the said portion of my speech to influence the jurors of the county of Leitrim upon any future trial of the case in question to find a verdict against the accused or any of them. I had not present to my mind at the time I made the speech the possibility of the case being tried again, and in no way, directly or indirectly, referred to any of the persons charged, or suggested that any evidence had been given tending to establish the guilt

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of the accused. That nothing in the said portion of my speech was calculated to influence the said jurors to find a verdict against the accused, or any of them; and I say that the suggestion that the common jurors of the county of Leitrim would be so influenced can hardly be seriously intended." This is the second paragraph of his affidavit. I unhesitatingly accept the statement that he did not in any way intend to influence the jurors of the county of Leitrim in any future trial of the case, and that when he spoke he had not present to his mind the possibility of the case being tried again. As to this, in my opinion, no doubt can exist. As far as the trial affected the accused, as distinguished from the commission of an offence, he spoke wholly inadvertently. But was what he did say calculated to prejudice the minds of the Leitrim jurors? This is the test: not what Mr. Long actually intended, but was what was said really calculated to prejudice the trial? This is the determining factor in the consideration of the motion. I have already referred to the opinion of the Attorney-General, and putting aside Mr. Long altogether, I think it only fair to the Attorney-General to say that I agree with him, though I am careful not to make his action in the matter the ground or a ground of my judgment.

But let me examine the matter a little more in detail. On the occasion of the speech at the Rotunda there were over eleven columns of oratory delivered. Since the arguments concluded I have read all this oratory—a severe exercise of judicial duty. I did so in order to see whether there was any previous reference to the trial at Sligo, because it occurred to me that repetition might —to use the expression of an English judge on a like motion— have a cumulative effect. I was glad to find there was no such reference. It is to be remembered also that Mr. Long was not the principal speaker at the Rotunda meeting. The speech of Mr. Austen Chamberlain, who came from England to address the Unionist party, was the special feature of the occasion. He spoke first, and speakers other than Mr. Long spoke after him. Mr. Long did speak at the principal meeting, but it was at the overflow meeting that he made the observations that are complained of. His observations are to be found in the ninth column of the oratory that marked the occasion.

Now, take the Leitrim juror. If he read conscientiously, he would have to read through Mr. Austen Chamberlain's speech, and the speeches of several others, the speech of Mr. Long himself at the principal meeting, before his conscientious effort reached Mr. Long at the overflow meeting. The juror who did this must be a perfervid enthusiast in politics. It is said that the Rotunda meeting was a sort of *urbi et orbi* performance, that Unionists flocked from all parts of Ireland to hear the orators of the occasion. I pass from this topic, asking one question, and one question only: Did the common jurors of Leitrim pay their expenses all the way up from Leitrim to Dublin to hear Mr. Long? It is now alleged that the speeches at the Rotunda meeting were in the nature of *ex cathedrâ* utterances, that Mr. Long's speech was to be preserved, and was to be handed down as a holy tradition from father to son by the common jurors of Leitrim. It is enough merely to state this contention to warrant me in passing away from it as not calling for any serious treatment. But let me put some questions. Firstly, would the *Daily Express* or *Irish Times* be read by the common jurors of Leitrim? Secondly, would they read it through? Thirdly, would they read Mr. Long's observations, who was not the principal speaker; observations made not at the principal meeting, but at the overflow meeting? Fourthly, would they discover the impugned sentences? Fifthly, would they consider them a reflection on the action of the accused, who were not named at all? Sixthly, was anything Mr. Long said calculated to influence the Leitrim jurors? Seventhly, would the impression made by Mr. Long's observations—if any impressions were made—be of so abiding a character as to prejudice the fair trial of the accused several months after they were delivered? The speech was delivered on the evening of the 7th December, and the Leitrim Assizes will take place about the middle of March. I don't think that any observations that Mr. Long might make would find the common jurors in such an impressionable and malleable mood. What does all this amount to? A possibility upon a possibility, a remote contingency upon a very remote contingency. We must look at the realities of things. 'Tis true that Mr. Long was Chief Secretary for Ireland in a Unionist

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Government. 'Tis true that he is a Unionist member for South Dublin, but is all this calculated to make the common jurors of Leitrim his disciples, the obedient recipients of his suggestions? 'Tis said that a Unionist *might* escape the process of elimination by challenge for the prisoner and be on the jury, and *might* have read the *Irish Times* or *Daily Express*, or *might* have waded through all the previous speeches up to Mr. Long's speech at the overflow meeting, and *might* have seen the offending sentences, and *might* have understood them as an attack upon men that were never named, and *might* when under the obligation of an oath consciously or unconsciously suffer himself to be influenced by them several months after they were delivered—contingencies upon contingencies. Are these the topics that are to determine the exercise of our discretion as to the issue of this process of attachment which all the most distinguished Judges have told us should be issued only in circumstances of a very exigent necessity? These suggestions appear to me to be of a very flimsy character. We must, as I have said, regard the realities of things.

My brothers Madden and Kenny have referred to the principles which should guide the discretion of the Court in a case of this sort. The well-recognised principle is that the Court should not interfere unless, in the language of Lord Justice Fry, something has been done likely seriously to prejudice the fair trial of the cause. That was the principle laid down by very eminent Judges in the well-known case of *Hunt* v. *Clark* (1). Lord Justice Cotton uses in the same case language practically identical with that of Lord Justice Fry. In fact we all agree as to the principle. It is only as to the application of it that there is any difference of opinion in the Court. The majority of the Court are of opinion that we should do what was done in that case—refuse the motion, but refuse it without costs, as we entirely disappove of any reference to a pending trial. This was what was done in the case of *Hunt* v. *Clarke* (1) by three very distinguished Judges, Lords Justices Cotton, Fry, and Lopes.

But speaking of the application of the principle as distin-

(1) 37 W. R. 724.

guished from the enunciation of the principle itself, I might refer, as my brethren have done, to the latest case on this subject of contempt of Court, the case in which judgment was given on Saturday last in the Royal Courts in London, the case of the *Evening Standard* against Mr. John Burns, the President of the Local Government Board. We have got from the proper office in London all the papers in this case. The case was conversant with not only one, but twelve actions. I don't see any difference in principle between a prosecution and an action, because the question in every case, whether criminal or civil, is whether what was said is calculated to prejudice a fair trial. But to recur to the case of Mr. John Burns, as I have said, there was not only one but twelve actions pending against the *Evening Standard* for some reflections it made on certain members of the London County Council. Twelve of them brought actions against the *Evening Standard*, and a few days after the writs were served there was a meeting at the Queen's Hall, at which Mr. Burns spoke, and in the course of an emphatic—I would say a very vehement—speech, he referred to the actions, and denounced the *Evening Standard* by name. He said the old *Standard* would not do it, and the new *Standard* would rue it. Let me give his very words:—"What," said Mr. Burns, "is the charge made against these twelve gentlemen? I know it, as we all know it, to be unfounded, unfair, and untrue." Later on he said: "I invite the evidence, if any; I demand the publication of what was said, because I have memories, almost traditions, of the old *Standard*; against us politically, but a fair, honest, upright paper that would not condescend to the mischievous slander that has been produced by that paper to-day, but which it cannot justify by the test of evidence." That is to say, that the *Evening Standard*, which was denounced by name, was not fair, honourable, upright, or even decent, because of the slander it produced; and at the very close of his remarkable speech, Mr. John Burns made a very earnest appeal. I give his language: "I do appeal," said the right honourable gentleman, "to the best of the Press to reprove, correct, and punish this new type of yellow journalism, which is degrading our public morals and will degenerate them." Could anything be stronger than this? He denounces, as I have pointed out, the *Evening Standard* by

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name. He says the charges are untrue, that there is no defence, and he appeals to other portions of the Press not merely to reprove but to punish. Who is Mr. Burns? He is President of the Local Government Board in London, not an ex-Minister, but a member of the present Cabinet. Where were the words spoken? In the Queen's Hall, almost within earshot of the Royal Courts of Justice, not, as in Mr. Long's case, over 100 miles from the Court in which the case against the applicants is to be tried. Where were the words reported? Not in papers that, though remarkably well-written, have but a precarious circulation in a particular venue, but in all the leading organs circulating within the venue. How was the case put forward? Was there any miscarriage on the part of the legal adviser of the *Standard*? The motion against Mr. John Burns was moved by Sir Edward Carson. There is no more distinguished advocate at the Bar of any country, and notwithstanding all this, what did the Court do? They refused even a conditional order to have the case argued. Mr. Justice Darling said that although the speech was one of extraordinary indiscretion and impropriety, showing, he thought, a very slight regard for the administration of justice by the Courts of the King, yet upon the ground that he could not say it was really calculated to prevent a fair trial, he thought there should be no rule granted in the case. Mr. Justice Phillimore said that he agreed, and that he was very glad to have that opportunity of saying what he had said before, and what he said every time—that the world had gone mad on the doctrine of contempt of Court, and that the doctrine ought not to be extended. Well, if the Court were justified in not interfering in Mr. Burns's case, *a multo fortiori* it would not be justified in interfering in Mr. Long's case. But I am very desirous to say that although I approve of the principle upon which Mr. Justice Darling acted, I abstain from all observations as to the application of that principle in the case of Mr. John Burns. We do not base our decision upon that case. We have arrived at the conclusion we have formed independently of that decision. It has been suggested that if we did not either imprison or fine Mr. Long, we might be embarrassed in dealing with other cases. I am clearly of opinion that our hands will be in no way tied by what we have done if there should be hereafter

anything said or done really calculated to prejudice the course of justice.

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Solicitor for the applicants: *M. J. Howley.*
Solicitor for Mr. Long: *William V. Seddall.*
Solicitors for Messrs. Locker and Hall: *Casey & Clay.*
Solicitors for Lord Ardilaun and Mr. M'Peake: *Sutton & Son.*

J. L.

THE KING (SUPPLE) *v.* THE CHAIRMAN AND JUSTICES OF CO. CLARE (1).

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Nov. 6, 8, 16.
Appeal.
Dec. 18.

Licensing law—Licensing (Ireland) Act, 1902 (2 *Edw.* 7, *c.* 18), *s.* 3—*Licensed premises evicted—License granted to landlord—Subsequent application by tenant for license for premises in vicinity.*

A was yearly tenant to B of certain licensed premises, the premises having been licensed before the creation of the tenancy. A's tenancy was determined by notice to quit, and he was evicted, and possession obtained by B. B applied for and obtained a new license for the premises. A subsequently applied, under section 3 of the Licensing (Ireland) Act, 1902, for a new license for premises which he had taken in the immediate vicinity:—

Held, by the King's Bench Division and the Court of Appeal, that there was no jurisdiction to grant such license to A.

CERTIORARI.

In the year 1893 the owner of certain premises in Mill Street, Ennis, to which a publican's ordinary seven-day retail license was attached, let the premises on a yearly tenancy to one Patrick Morony, who subsequently obtained a transfer of the license. Morony's interest in the premises and license afterwards became vested in his daughter, who, in the year 1896, married one Thomas Lyons. Lyons thereupon obtained a transfer of the license into his own name, and carried on the business of a publican on the premises until his eviction, as hereinafter men-

(1) In the King's Bench Division, before LORD O'BRIEN, L.C.J., and MADDEN and WRIGHT, JJ.

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tioned, obtaining a renewal of the license each year, down to and including October, 1904. In July, 1903, Mrs. Honoria Cullinan, in whom the lessor's interest in the premises had become vested, served a notice to quit on Lyons, upon which ejectment proceedings were taken, and possession of the premises was recovered by Mrs. Cullinan from Lyons on the 5th April, 1905. Lyons retained the license, refusing to deliver it up to Mrs. Cullinan. At the Annual Licensing Quarter Sessions, in October, 1905, Mrs. Cullinan applied for a certificate for a new license for these premises.

Lyons, in the meantime, had taken other premises situate in the same street, two doors away from the premises from which he had been evicted, and had spent £700 in building a house on them. He had these new premises provisionally valued, and applied at the October Quarter Sessions, 1905, for a certificate for a new license for them. At the request of Lyons, his application and that of Mrs. Cullinan were heard together, and both applications were granted by the magistrates.

In February, 1906, the certificate so granted to Lyons was quashed on *certiorari*, on the ground that the provisional valuation of the premises did not satisfy the requirements as to valuation contained in sect. 5 of the Licensing (Ireland) Act, 1902. In April, 1906, Lyons again applied at Quarter Sessions for a certificate for a new license in respect of these new premises. The application was opposed by the prosecutor, the District Inspector R.I.C., on the ground, *inter alia*, that the licensing authority under sub-section 1 of section 2 of 2 Edw. 7, c. 18, having already granted a license to Mrs. Cullinan in respect of the original premises, no license was extinguished, and that the licensing authority had no power to grant a license, under sect. 3 of the said Act, in respect of the new premises. The magistrates granted Lyons the certificate applied for.

A conditional order was obtained by the prosecutor for a writ of *certiorari*, to set aside the order of the magistrates granting this certificate on the grounds—(*a*) that the Justices had no jurisdiction to grant the said license under sect. 3 of 2 Edw. 7, c. 18, as there had been no expiration of a lease within the meaning of said section; (*b*) that, even assuming that there had been such an

expiration of a lease, a license for the sale of intoxicating liquors for consumption on the premises comprised in the lease had not been extinguished or surrendered within the meaning of said 3rd section by reason of said expiration of a lease, or at all.

The present application was to make this conditional order absolute, notwithstanding cause shown by Lyons.

Redmond Barry, K.C. (*Solicitor-General*) (with him *Dudley White*), for the prosecutor:—

Having regard to the case of *The King* (*Wright*) v. *Justices of Cork* (1), we do not propose to contend that there was not in the present case an "expiration of a lease" within the meaning of the 3rd section of the Licensing (Ireland) Act, 1902. We submit, however, that no license has become extinguished by reason of such expiration. On the eviction of Lyons Mrs. Cullinan would have been entitled, if she had applied for it, to a transfer of his license, under 18 & 19 Vict. c. 114, s. 1. The word "removal" in that section includes a case in which the tenant is compelled to quit by the landlord: *The Queen* v. *Justices of Tipperary* (2) (*per* O'Brien, J., p. 267). The premises here were licensed when originally let. Lyons was bound to give them up in the same condition as when let—that is to say, with a license attached—and was therefore bound to hand over the license to Mrs. Cullinan. The right of Mrs. Cullinan to a transfer could not have been defeated by Lyons wrongfully withholding the actual license. In such case the indorsement required by 18 & 19 Vict. c. 114, may be made on a certified copy of the license: *Brennan* v. *Dorney* (3) (*per* Chatterton, V.-C., p. 361). The decision of the Vice-Chancellor in that case was reversed on appeal (4) on the special facts; but this proposition was not questioned by the Court of Appeal, either in that case, or in the subsequent case of *Kelly* v. *Montague* (5), in which *Brennan* v. *Dorney* (3) was considered.

If the contention of Lyons is right, the number of public-houses will be increased, and there will be two where formerly there was only one. This is contrary to the policy of the Act of

(1) [1906] 2 I. R. 349.
(2) 4 L. R. Ir. 259.
(3) 21 L. R. Ir. 353.
(4) 21 L. R. Ir. 364.
(5) 29 L. R. Ir. 429.

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1902, which is that the *status quo* was to be preserved, not extended: *The King* (*Collins*) v. *Justices of Donegal* (1) (*per* Lord O'Brien, L.C.J., p. 536). The existing state of things was to be stereotyped for five years, due regard being had to existing interests and the requirements of the public (*ib.*, *per* Madden, J., p. 536). The requirements of the public in the present case are sufficiently met, inasmuch as the business is being carried on on the old premises. Section 3 was not intended to protect any interest in the former tenant, since the right to apply under the section is not limited to him; but such application may be made by anyone possessed of suitable premises in the immediate vicinity. The object was the benefit of the public, to prevent inconvenience to it by the permanent closing of a publichouse, presumably required, without a substitute being provided: *The King* (*Wright*) v. *Justices of Cork* (2) (*per* Palles, C.B., p. 354). "Extinguished" in section 3 means permanently extinguished.

Lynch, *K.C.*, and *Phelps*, for Thomas Lyons:—

The license granted to Lyons in respect of the original premises was extinguished by his eviction. Mrs. Cullinan would not have been entitled to either a transfer or renewal of that license. Where the connexion between the person and the premises is determined, and the common title to license and premises interrupted, the right to a renewal or transfer is lost: *The Queen* v. *Justices of Tipperary* (3) (*per* FitzGibbon, L.J., p. 136). In such case the license is extinguished upon the licensed person quitting: *The King* (*Wright*) v. *Justices of Cork* (2) (*per* Palles, C.B., p. 353); *Rex* (*Baldwin*) v. *Cork Justices* (4). A landlord taking possession by title paramount is not entitled to a transfer under 18 & 19 Vict. c. 114: *Rex* (*Jordan*) v. *Justices of Roscommon* (5); see also *The Queen* (*Murphy*) v. *Recorder and Justices of Cork* (6); *In re Gilmer* (7).

As to the argument founded on the policy of the Licensing Act of 1902, that Act does not necessarily prohibit the increase of

(1) [1903] 2 I. R. 533.
(2) [1906] 2 I. R. 349.
(3) 6 L. R. Ir. 129.
(4) 35 I. L. T. R. 55.
(5) 38 I. L. T. R. 25.
(6) [1895] 2 I. R. 104, 119.
(7) 17 L R. Ir. 1.

the number of licenses. If Lyons had applied first, and obtained a license for the new premises, under section 3, there would clearly have been jurisdiction afterwards to grant, under section 2, subsection 1, a license to Mrs. Cullinan in respect of the original premises, in which case there would have been two licenses instead of one. Suppose both parties, the landlord and the evicted tenant, make their respective applications at the same Sessions, is the right of the latter to depend on which application happens to be heard first?

Statutes are to be interpreted, if possible, so as to respect the rights of subjects: Maxwell on Statutes, 4th ed., p. 427; *Western Counties Railway Co.* v. *Windsor and Annapolis Railway Co.* (1); *Commissioners of Public Works* v. *Logan* (2).

The Solicitor-General, in reply.

Cur. adv. vult.

LORD O'BRIEN, L.C.J.:—

Nov. 16.

This case, although an important one, in my judgment admits of a ready solution. It turns upon the construction of the 3rd section of the Licensing (Ireland) Act, 1902. The question is, whether the circumstances of this particular case bring it within the section. The Solicitor-General, in a very clear and excellent argument, says "No." Mr. Lynch, in an equally clear and excellent argument, says "Yes." I think that the contention of the Solicitor-General is right.

Let me take the dates. At the October Licensing Sessions, 1905, two licenses were granted—one to Mrs. Cullinan, in respect of the premises from which Lyons, the former tenant, had been evicted; and one to Lyons, in respect of premises he had taken in the immediate vicinity of his former premises.

The license granted to Lyons was afterwards quashed on *certiorari*. He then applied again at the April Sessions, 1906, for a license for the same premises, and this was granted. The question is, Was there jurisdiction to grant it? I think not, because the case is not within sect. 3 of the Act. Perhaps that section of the Act is not expressed with an ideal precision, but reading the

(1) 7 App. Cas. at p. 188. (2) [1903] A. C. 355.

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3rd section as a whole, and noting in particular the words "in the immediate vicinity," which clearly point to the substitution of one publichouse for another, it is plain, I think, that it was never intended by this Act of 1902, which limited the power to grant licenses, to warrant the establishment of two publichouses, cheek by jowl, in a locality where one sufficed before. The April Sessions of 1906 was the crucial period, and then Mrs. Cullinan was licensed by a license which remained unquashed and unavoided, which was a protection to her in the carrying on of her business.

This license applied to the original premises, and certainly it was never intended whilst this license existed that there should be power to grant in the immediate vicinity to them a new license.

MADDEN, J. :—

The question for our decision is, whether in the month of April, 1906, the conditions existed which were required in order to bring the applicant within the exception contained in the 3rd section of the Act of 1902. Certain of these conditions were undoubtedly satisfied at that time. The applicant's premises must be taken to have been suitable, and in the immediate vicinity of certain other premises, the lease of which expired, within the meaning of the statute, on the 5th of April, 1905. To the last-mentioned premises a license had been attached, which, in my opinion, became extinguished by reason of the expiration of the lease, at the moment of its expiration. From the month of April, 1905, until the month of October in that year all the conditions of the section co-existed. But from the month of October there continued to be attached to the premises, to which the license had been attached which became extinguished on the 5th of April, 1905, a license which was in the month of April, 1906, neither extinguished nor surrendered. If it were necessary, in order to give a reasonable construction to the 3rd section, to read the words "is extinguished or surrendered" as applicable to extinguishment or surrender in the past, the words would be capable of such a construction. Having regard, however, to the plain object of the section, and to the mischief which it was obviously intended to remedy, I am of opinion that the period to which the section applies is the time of the application

for a new license. For the exception in the 3rd section was passed in the interests of the locality. The mischief against which it was directed was the loss to a vicinity of a publichouse to which it was fairly entitled, by reason of the landlord neglecting or refusing to apply for a new license on the expiration of a lease. This is evident from the language of the section. It is not concerned with the protection of any *quasi*-proprietary interests which might have attached to the old license. As was pointed out in *The King* (*Collins*) v. *Justices of Donegal* (1), the owner of the premises was protected by sub-section 1 of section 2. He was not in a position to obtain a transfer of the old license under the 1st section of 18 & 19 Vict. c. 114. There was not a "removal" within the meaning of that section. A *dictum* of Mr. Justice O'Brien in *R.* v. *Justices of Tipperary* (2) was quoted in support of the proposition that the word "removal" in that section applied to the dispossession of a tenant on the termination of a lease. But he was the dissentient Judge in that case, and his opinion was not adopted either in the Court of Appeal, or, as far as I am aware, in any subsequent case. I think, therefore, that the old license was completely extinguished on the termination of the letting of the premises by eviction, and that it would have been, under any circumstances, necessary for the landlord to apply for a new license.

As regards the former tenant of the premises, he is in no better position than any other member of the public applying as the owner of a suitable house in the immediate vicinity.

It was strongly argued by Mr. Lynch that his client was within the provisions of the section, read literally, inasmuch as the former license was extinguished by reason of the expiration of the lease. He succeeded in showing that in a certain state of facts two licenses might be substituted for one, by the conjoint operation of section 2, sub-sect. 1, and sect. 3; and he contended that the argument based on the general policy of the statute could not be called in aid of a section under which the number of licenses could be, under certain circumstances, increased.

This increase, in the case supposed by Mr. Lynch, takes place in consequence of the continuing operation of the provisions of

(1) [1903] 2 I. R. 583. (2) 4 L. R. Ir. 269.

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section 2, sub-sect. 1, not by virtue of section 3. If an application for the grant of a new license under section 3 cannot affect the status of the owner of the premises formerly licensed, or his right under section 2, sub-sect. 1, the fact that a new license has been already granted under section 3 does not deprive him of his status under the clear words of the preceding section, although it may lead the licensing authority to refuse his application on the ground that the requirements of the locality have been already sufficiently met.

The case is different where an application is made under section 3. No rights are conferred by that section on individuals, personally or as the owners of premises previously licensed. The question whether a license has been extinguished within the meaning of the section must be answered with a view to the requirements of the vicinity, from which it seems to follow that the inquiry is limited to the state of facts at the date of the application. I am not disposed to adopt a construction of the section, literally accurate, which conflicts with what is to my mind the manifest intention of the section—that is, that the new license should be in substitution for a former license which has ceased to exist. The new license granted in respect of the old premises becomes, in my opinion, a graft or continuation of the former license, so as to prevent it from being regarded as permanently extinguished at the date of the second application. For these reasons I do not think that the applicant has brought himself within the exception contained in the 3rd section, inasmuch as he has failed to show that the license attached to the old premises was at the date of his application extinguished or surrendered, although this state of things existed up to the date of the revival of the old license in October, 1905.

WRIGHT, J.:—

The general policy of the Act of 1902, 2 Edw. 7, c. 18, is plain from the language and general tenor of the Act itself, and has been declared by two decisions of this Court: *The King (Collins)* v. *The Justices of Donegal* (1); and *The King (Wright)* v.

(1) [1903] 2 I. R. 533.

The Justices of Cork (1). That policy was to prevent an increase in the number of houses licensed for the sale of intoxicating drink in Ireland, and the means by which this was sought to be effected was by a sweeping enactment that for the space of something over five years from the passing of the Act no new licenses should be granted, except in certain specified cases.

As pointed out by the Lord Chief Baron in the case of *The King (Wright)* v. *The Justices of Cork* (1), section 3 was passed in the interest of the public, so that a locality might not suffer by a house losing its license in consequence of the expiration of the lease under which it was held, and the license being thereby extinguished. That decision, which binds this Court, has ruled that the determination by notice to quit of a tenancy from year to year, which is the present case, is an "expiration of a lease" within section 3 of the Licensing (Ireland) Act, 1902. At page 354 of the report, the learned Chief Baron, in dealing with the object of that section, uses the following language:—"Now, the object of this provision being one for the benefit of the public, to prevent inconvenience to it by the permanent closing of a publichouse, presumably required, without a substitute being provided, the words should *primâ facie* be construed so as to make the remedy co-extensive with the mischief; and as publichouses can be, and as we judicially know often are, held under tenancies from year to year created without writing, the word 'lease' cannot be read in so restricted a sense as to exclude those tenancies."

It has been contended by counsel for Lyons that it was intended by the section to protect the interest of the person who had lost the license by the determination of the lease, *i.e.*, the evicted tenant. But it will be seen that the language of the section is general, and has no reference to the interest, or privilege, or whatever it may be called, of the evicted lessee. Any one of the public may apply when the conditions of that section are found to exist; and I fully adopt the view of the Lord Chief Baron that the section was for the benefit of the public, and to prevent inconvenience to the locality.

In the present case there is no controversy as to the facts, which may be shortly stated. This house when first let to a

(1) [1906] 2 I. R. 349.

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tenant had a license attached to it, which by a series of changes became transferred into the name of the late tenant, Lyons. Lyons was evicted in April, 1905, and in the following October the landlord succeeded in getting a new license for this house. No other course was open to him, as Lyons refused to part with the old license, which to him was worthless, but the possession of which would have enabled the landlord to get a transfer under 18 & 19 Vict. c. 114, sect. 1.

Passing over the abortive attempt by Lyons to get a license for the new house built by him, which was granted by the Court of Quarter Sessions, but which was quashed by order of this Court in January last, the state of things subsisting at the time when Lyons applied for and obtained in April of this year the present license for the new house, was, that there was no diminution in the number of licensed houses in the locality; the house from which he was evicted was again a licensed house, in which the business of a publican was being carried on, a new license for it having been applied for and obtained under the provisions of section 2, sub-sect. 1, of the Act of 1902 in the previous October. Was it intended by this Act, which undoubtedly had for its object, as already stated, to prevent the increase of the number of licensed houses, that section 3 should be invoked to get a new license for this house to replace the old one that was gone, and that after this had been legally accomplished, and all possibility of inconvenience to the public had been removed, a new license for another house in the locality, "the immediate vicinity," should be granted under section 3? This result is certainly contrary to the whole policy and object of the Act, and is, I think, not justified by the words of the section, which, in my judgment, apply to the case, not of a license temporarily suppressed or withdrawn from a house, but to the case of a house, from being a licensed house, becoming, and continuing up to the time of the application to Quarter Sessions, in this case April, 1906, to be unlicensed.

If the contrary view prevailed, the result under this Act of Parliament would be the creation of two licenses in place of one, and the second, that for the new house, would certainly meet no public need, nor obviate any public inconvenience.

It has been contended that under certain circumstances an increase in the number of licenses under this Act might be brought about by the conjoint operation of sections 2 and 3—*e.g.* if Lyons and Mrs. Cullinan, the landlady, both applied for new licenses: Lyons for a house in the immediate vicinity, properly valued, so as to satisfy the requirements of section 5 of the Act, and Mrs. Cullinan for the old house. That result may follow, and it may be that in that event the Legislature would have left it to the discretion of the magistrates to prevent an increase. Also, it may be that if Lyons applied first and got a new license for a house in the immediate vicinity—which is what occurred in *Wright's Case* (1)—the landlord could afterwards apply for a new license for the old house under section 2 (1). These events may not be guarded against by the Act.

Taking the general policy of the Act to be clear, and the scope and object of the section to be as already stated, what is the legal result of the state of things subsisting when in April last Lyons applied for the license, the legality of which is now under consideration? The old house was again a licensed house; it seems to me to be immaterial, having regard to the intention of the Act, whether drink was being sold in it under a transfer of the old license, or under a license new in form. I have already pointed out that the landlady was driven to apply for a new license by the refusal of Lyons to give her up the old one. The convenience of the public had been sufficiently provided for; there was no extinguishment of a license to justify the granting of a new one in lieu of or in substitution for it.

For these reasons I think that the conditional order ought to be made absolute.

J. G. T.

Thomas Lyons appealed to the Court of Appeal (Sir S. Walker, C., FitzGibbon, and Holmes, L.JJ.).

(1) [1906] 2 I. R. 349.

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THE KING (SUPPLE) *v.* JUSTICES OF CLARE.

Lynch, K.C., and *Phelps*, for Thomas Lyons.

The Solicitor-General (*Redmond Barry, K.C.*), and *Dudley White*, for the prosecutor, were not called on.

The appeal was dismissed.

Solicitor for prosecutor: *Malachy J. Kelly.*
Solicitors for Lyons: *Molony & Pilkington.*

R. ST. J. C.

K. B. Div. 1906.

Nov. 19.
Dec. 20.

Appeal. 1907.

Feb. 7, 8, 28.

OMAGH URBAN DISTRICT COUNCIL *v.* HENDERSON (1).

Compulsory purchase—Housing of the Working Classes Act, 1890 (53 & 54 *Vict. c.* 70), *Schedule II.—Lands Clauses Act*, 1845, *sect.* 124—*Title—Ejectment—Omitted interest.*

The plaintiffs were authorized by a Provisional Order of the Local Government Board, dated 30th April, 1901, and an Act of Parliament confirming same, to take by compulsory purchase certain lands, including those in dispute in this action. The lands required were the fee-simple property of G., and the defendant, who held adjoining lands from G. under a lease, encroached upon the lands of G., and had, prior to the date of the plaintiffs' Provisional Order, acquired a title under the Statute of Limitations to portion of the lands required by the plaintiffs, for the residue of the term of his lease. This portion was included in the advertisements issued and the plans deposited by the plaintiffs, under Schedule II. of the Housing of the Working Classes Act, all the provisions of which were duly complied with by the plaintiffs, save that the name of the defendant (of whose claim the plaintiffs were ignorant) did not appear in the schedule to the deposited plans, or in the arbitrator's award, as a person having an interest in the premises, nor was any notice of the publication of the award left at the defendant's premises, or sent by post to him. No claim was ever made by the defendant to the plaintiffs in respect of any interest in the premises.

In an action of ejectment brought by the plaintiffs against the defendant, to recover possession of that portion of the lands to which the defendant had so acquired a title:—

(1) In the King's Bench Division, before LORD O'BRIEN, L.C.J., and MADDEN and WRIGHT, JJ.

Held, by the Court of Appeal (affirming the decision of the King's Bench Division), that the plaintiffs were not entitled to recover possession.

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OMAGH U. D. C. *v.* HENDERSON.

CASE STATED by Palles, C.B., on the hearing of a civil bill appeal at the Omagh Summer Assizes, 1906, as follows :—

1. This was a civil-bill ejectment on the title, at the suit of the Omagh Urban District Council, as plaintiffs, against William Henderson, as defendant, brought to recover all that and those that part of the lands of Meetinghouse-hill, in the parish of Drumragh, and barony of East Omagh, containing 1A. 3R. 33P. statute measure or thereabouts, as set forth in the civil bill which is incorporated herein and set out in the schedule hereto, and was heard at Omagh June Sessions, 1906. The plaintiffs appealed and the appeal was heard by me at the Summer Assizes, 1906, for the county of Tyrone.

2. The plaintiffs claim to be entitled to the premises mentioned in the civil bill by virtue of a certain Provisional Order of the Local Government Board for Ireland, dated 30th April, 1901, a certain Act of Parliament intituled the Local Government Board (Ireland) Provisional Orders Confirmation Act, and by virtue of a certain award, dated the 7th November, 1901, and made by Robert Haire, Esq., C.E., the duly appointed arbitrator, whereby a sum of £264 was awarded as the price to be paid by the plaintiffs for the purchase of the several interests in the lands specified and described in the schedule thereto, and by virtue of a certificate given by the plaintiffs in pursuance of Article 14 of the second Schedule of the Housing of the Working Classes Act, 1890, 53 & 54 Vict. c. 70, given on the 3rd March, 1902, and of a conveyance of the said lands by John S. Galbraith and others to the plaintiffs, dated the 4th July, 1902. The several documents herein referred to are incorporated herein and mentioned in the schedule hereto.

3. The defendant, William Henderson, is tenant of the adjoining land under a lease (the term of which has not yet expired) under the said John S. Galbraith, and was and is in possession of a certain portion of said lands coloured red and delineated in a map, which was proved at the trial and which I incorporate herewith,

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such portion being part of the said lands comprised in said award. The defendant took defence for this portion only.

4. I found as a fact that the defendant, William Henderson, had been in possession of the said portion coloured red (which he used in conjunction with his said adjoining holding) for such a period of time that prior to the 30th April, 1901, he had acquired a title thereto by virtue of the Statute of Limitations, and that upon said 30th April, 1901, he was, and (unless his title has been extinguished by the proceedings and matters herein stated) he still is, possessed of the said portion in dispute for the residue of the term mentioned in his lease.

5. The name of the defendant did not appear in the schedule to the deposited plans, or to the said award, as a person having an interest in said premises, nor was any notice of the publication specified in Article 6 of said second Schedule to the Housing of the Working Classes Act (53 & 54 Vict. c. 70) left at the said premises, or sent by post to the defendant; but, save as aforesaid, all the other provisions contained in said second Schedule were duly complied with. No claim was ever delivered to the plaintiffs by the defendant in respect of any interest in said premises.

6. It was contended on behalf of the plaintiffs that, by virtue of the several proceedings herein recited and documents herein referred to, the plaintiffs have a statutory title to the lands comprised within the award, and that any claims of parties interested can be dealt with only under the sections dealing with omitted interests.

7. The question for the King's Bench Division on the facts above stated and found by me is, whether the plaintiffs are entitled to recover possession of the portion of the lands mentioned in said award, coloured red in said map?

C. PALLES.

3*rd August*, 1906.

SCHEDULE OF DOCUMENTS INCORPORATED HEREIN.

1. Civil-bill process for Ejectment on the Title between Omagh Urban Council against William Henderson.

2. Map of premises described therein, marked by my Registrar.

3. Provisional Order of the Local Government Board for Ireland, dated 30th April, 1901, called the Omagh Order, 1901.

4. Arbitrator's Award, dated the 7th November, 1901, signed by Robert Haire, Esq., M.Inst.C.E.

5. Certificate given under seal of the Urban District Council of Omagh, as Sanitary Authority, dated 3rd March, 1902.

6. Conveyance, dated 4th July, 1902, between John S. Galbraith and others to Omagh Urban District Council.

Serjeant Dodd and *Murnaghan*, for the plaintiffs.

Henry, K.C., and *Glover*, for defendant.

MADDEN, J.:—

Dec. 20.

The plaintiffs in this case, the Omagh Urban District Council, seek to obtain possession of a small plot of ground to which they claim to have acquired a statutory title. The case which has been stated by the Lord Chief Baron sets forth the facts, which are shortly these. The plot of ground in question was scheduled as portion of the land which the Urban District Council proposed to take for the purpose of the scheme. The Lord Chief Baron finds that the defendant, William Henderson, who is tenant of the adjoining land, had been in possession of a small portion of the scheduled land, coloured red on the map, for a period of time sufficient to enable him to acquire a title to it by virtue of the Statute of Limitations, and that at the time of the institution of the present proceedings he was in possession of it. The name of the defendant did not appear in the schedule to the deposited plans, or to the award, as a person having an interest in the premises, nor was any notice of the publication specified in Article 6 of the second Schedule to the Housing of the Working Classes Act (53 & 54 Vict. c. 70) left at the premises, or sent by post to the defendant, but all the other provisions contained in the Schedule were duly complied with. No claim was ever delivered to the plaintiffs by the defendant in respect of any interest in the premises.

The provisions of the Housing of the Working Classes Act, 1890, as set forth in its second Schedule, govern the proceedings in the present case. I had occasion to examine these provisions

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somewhat in detail in the case of *In re Parkinson* (1), but so far as they are material for the purposes of the present case they can be shortly stated. The provisions with regard to arbitration are set forth in clauses 5 to 10. They have been fully complied with in the present case, and so far as regards the greater portion of the scheduled land no difficulty arises.

I have carefully examined these provisions, and I am of opinion now, as I was when the case of *In re Parkinson* (1) was decided, that the receipt operates in itself as a statutory conveyance as regards the estate and interest of Galbraith, but as regards other interests, I am of opinion that it has no effect whatever, and that it cannot be relied upon as supporting the title of the plaintiffs in this case.

The Lord Chief Baron states that it was contended on behalf of the plaintiffs that by virtue of the several proceedings recited, and documents referred to, the plaintiffs had a statutory title to the lands comprised within the award, and that any claims of parties interested could be dealt with only under the sections dealing with omitted interests. The 13th clause of the second Schedule to the Housing of the Working Classes Act, 1890, provides thus:—"The amount of purchase-money or compensation to be paid in pursuance of section 124 of the Lands Clauses Consolidation Act, 1845, in respect of any estate, right, or interest in, or charge affecting any of the scheduled lands which the local authority have, through mistake or inadvertence, failed or omitted duly to purchase or make compensation for, shall be awarded by the arbitrator, and paid in like manner, as near as may be, as same would have been awarded and paid if the claim to such estate, right, interest, or charge, had been delivered to the arbitrator before the day fixed for delivery of statements of claim." I am of opinion that the defendant's interest is an "estate, right, or interest" affecting the scheduled lands, and I am also of opinion, upon the evidence, that it has been omitted by mistake and inadvertence. The result is, not the acquisition of a statutory title, but that—expensive as the proceeding may be—the arbitrator must award such sum as he may think right in respect of the plot of

(1) [1898] 1 I. R. 390.

ground in question. Until that has been done no statutory title has been acquired by the plaintiffs; and, therefore, the plaintiffs' action of ejectment must fail.

The Lord Chief Justice, who is unable to be present, authorizes me to state that he is of the same opinion.

WRIGHT, J. :—

The following documents are incorporated with the case stated :—

The award dated 7th November, 1901; certificate dated 3rd March, 1902; the conveyance from John S. Galbraith and his trustees to plaintiffs dated 4th July, 1902; and also the Provisional Order dated 30th April, 1901, and Confirming Act.

The defendant's name does not appear in the schedule to the deposited plans, nor in the award, and no notice was given to him under Article 6 of the second Schedule to 53 & 54 Vict. c. 70 (Housing of the Working Classes Act, 1890); but the lands in question are undoubtedly scheduled lands, and plaintiffs contend that by virtue of the various proceedings and documents they are in a position to maintain the present ejectment. Section 124 of the Lands Clauses Act, 8 Vict. c. 18, dealing with interests omitted to be purchased, referred to in Article 13 of the second Schedule to the Act of 1890, does not apply to this case. It applies to cases where the company or promoters of the undertaking are in possession of lands, but by mistake or inadvertence have failed or omitted to purchase some estate or interest in the lands, and it provides that the promoters shall remain in undisturbed possession, subject to the obligation on their part of purchasing or paying compensation for the estate or interest so omitted, in accordance with the provisions of the section. It is undoubted that the plaintiffs have never got possession, and it is found by the special case, paragraph 4, that defendant for years has been, and still is, in possession of this parcel of land.

The question is, Have plaintiffs got a statutory conveyance either by virtue of the award made under the Provisional Order and Confirming Act, or the certificate or the conveyance from Galbraith, or by the combined effect of all three, which will enable them to maintain the action?

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Articles 14-19 of the second Schedule have been read and fully discussed in the argument, and they in effect are re-enactments, with scarcely a verbal alteration, of sections of early English and Irish Railway Acts, among others the Lands Clauses Act, 1845 (8 Vict. c. 18), and the Railways (Ireland) Act 1851 (14 & 15 Vict. c. 70). The effects of the payment of the amount specified to be payable by a certificate, and of the receipt to be given by the party receiving the money, are clearly declared by Articles 18 and 19. On payment of the money the local authority is authorized to enter on the lands in respect of which the certificate is given, and from thenceforth to hold them "for the estate or interest in respect of which the amount specified in such certificate was payable," and the receipt is to have the effect of a grant, release, and conveyance of all the estate and interest of such party, and of all parties claiming under or through him, in the lands in respect of which such moneys are paid. Looking at the certificate and receipt relied on here, they relate to no other estate or interest than that subsequently conveyed to plaintiffs by the deed of the 4th July, 1902—namely, the estate of John S. Galbraith and his trustees. They all deal with the same subject-matter: the certificate specifies the amount payable for the Galbraith estate or interest, the receipt deals with this, and this only, and the conveyance purports to convey nothing more. These deeds and documents fail to give plaintiffs a title as against defendant to the piece of land in dispute. It has been further argued that the award made under an Act of Parliament confirming the Provisional Order obtained by the plaintiffs may have the effect of transferring to them, without more, this piece of land. This is not arguable. To yield to this contention would be to wipe out the elaborate machinery of the Lands Clauses Act with respect to the purchase and taking of lands otherwise than by agreement, which is expressly made applicable by section 20 of the Act (53 & 54 Vict. c. 70) and by the second Schedule to the Act.

I am therefore of opinion that the defendant's interest as lessee or tenant in the parcel of land, the subject-matter of the present action, has not been statutorily conveyed to, or acquired by, the plaintiffs.

The only way in which that can be done is by having recourse

to the procedure prescribed by the second Schedule. The arbitrator can be brought down, due notice having been given; the value of defendant's interest can be ascertained, and if he refuses to convey, the money can be paid into the Bank of Ireland, and a deed-poll executed by the plaintiffs, which will vest defendant's interest in them.

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J. L.

The plaintiffs appealed to the Court of Appeal (1).

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Serjeant Dodd and *Murnaghan*, for the appellants:—

(1). We contend that the plaintiffs are entitled to possession of the lands in dispute. All the provisions with respect to the compulsory taking of lands specified in the second Schedule of the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), have been duly complied with. This is a code complete in itself, and the provisions of the Schedule are substituted for the compulsory purchase clauses of the Lands Clauses Acts: *Rex* (*Kerry County Council*) v. *Leahy* (2). The maps and schedules of the lands proposed to be taken were duly deposited under Article 3 of Schedule II., and included the lands now in dispute. Notices were served upon all the persons specified in Article 6, so far as the plaintiffs knew of, or could have reasonably ascertained, their existence. They did not know and could not have ascertained that the defendant had acquired a title through encroachment. The award of the arbitrators made under Article 9 is final, and is binding and conclusive "upon all persons whomsoever." The defendant was a person having an interest in the lands: *Carr* v. *Metropolitan Board of Works* (3), and he is now estopped by reason of not having sent in any claim: Article 10. Article 18 gave the plaintiffs the right to enter upon the lands. They duly paid the amount of compensation specified by the certificate prescribed by Article 14, and the receipt for such compensation,

(1) In the Court of Appeal, before SIR SAMUEL WALKER, C., PALLES, C.B., and HOLMES, L.JJ.

(2) [1903] 2 I. R. 317.

(3) 14 Ch. D. 807.

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which was awarded in respect of all the lands taken, including those in dispute, had the effect of a conveyance of the lands: Article 19.

(2). Even if the plaintiffs have not acquired the complete interest in the lands, we rely upon Article 13 of Schedule II. and sect. 124 of the Lands Clauses Act, 1845, and contend that the plaintiffs are entitled to possession of the scheduled lands, leaving the defendant to his right (if any) to compensation in respect of an omitted interest.

[They cited *Caledonian Railway Co.* v. *Davidson* (1); *In re Shaw and the Corporation of Birmingham* (2); *In re Parkinson* (3); and *In re Traverses of Doyne* (4).]

Harrison, K.C. (with him *Henry, K.C.*), for the respondent:—

The plaintiffs must recover possession if at all by the strength of their own title, and no provision of the Lands Clauses Acts, or of Schedule II. of the Housing of the Working Classes Act, can be relied on by them as conferring a right to the possession of the lands in dispute. Schedule II. amends the code as to compulsory purchase contained in the Lands Clauses Acts, but only displaces such provisions in the latter as are inconsistent with those contained in the Schedule. One principle is clearly aimed at throughout—namely, that no owner is to be dispossessed without compensation. This is clear from sect. 84 of the Lands Clauses Act, 1845, which prescribes that the promoters shall not, except by consent of the owners and occupiers, enter upon any lands which shall be required until they have paid to a party having an interest in the lands, or deposited in the bank, the compensation or purchase-money agreed or awarded to be paid to such party. Article 18 of Schedule II. gave the plaintiffs no right to enter upon the lands in dispute. That Article must be read together with Article 19, by which it is limited, and which shows that it is only the estate or interest of the person giving the receipt for the compensation awarded, and of all parties claiming under or through him, which is vested by the receipt in the local authority;

(1) [1903] A. C. 22.
(2) 27 Ch. D. 614.
(3) [1898] 1 I. R. 390.
(4) 24 L. R. Ir. 287.

it is only such lands that the local authority is empowered to enter upon under Article 18. The defendant was no party to the receipt given, and so far from claiming under or through the persons giving the receipt, he was claiming adversely to them. The plaintiffs should have paid the money into Court under Art. 20.

The plaintiffs cannot rely upon the provisions as to omitted interests. They are not in possession of the lands in dispute, as is shown by the form of the present action, and sect. 124 of the Lands Clauses Act, 1845, shows that it was intended only to protect promoters who had unknowingly entered upon possession of lands, where, through mistake or inadvertence, they had omitted to purchase or pay compensation for an estate affecting such lands.

Feb. 28.

SIR SAMUEL WALKER, C.:—

This is an appeal from an order of the King's Bench Division deciding that the plaintiffs—the appellants—were not entitled to recover from the defendant in ejectment a small portion of land which the plaintiffs contend they acquired a title to against the defendant by virtue of certain proceedings under the Housing of the Working Classes Act, 1890, taken by them to acquire compulsorily lands which they required, and which include the bit in question.

Those lands required were the fee-simple property of John S. Galbraith, and the defendant had lands adjoining under a lease from him still unexpired, and he encroached on the bit in question, and occupied it so long that, as found by the Lord Chief Baron, he had, before the proceedings were instituted to take the lands, acquired under the Statute of Limitations a title during his lease as against J. S. Galbraith and all other persons. The bit in dispute is included in the map and schedule of the lands proposed to be taken, but the name of the defendant did not appear in the schedule as a person interested. An arbitrator was appointed to ascertain compensation. No notice of the publication mentioned in Article 6 in the schedule to the Act was in any way given to the defendant in the manner therein specified. No claim was ever made or delivered to the plaintiffs by defendant in respect

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of his interest. The arbitrator made an award on the 7th November, 1901, whereby a sum of £264 was awarded as the price to be paid by the plaintiffs for the purchase of the lands specified in the schedule, which, as I have said, included this bit, and on the 3rd March, 1902, they gave a certificate under the 14th Article of the second Schedule to the Act to the trustees of Galbraith's estate, stating that the £264 was payable to them as the compensation, and on the 4th July, 1902, Galbraith and his trustees in consideration of £264 conveyed to the plaintiffs all the lands mentioned in the schedule. The defendant having refused to give up possession to the plaintiffs, they brought a civil bill ejectment to recover the bit in question, and they contend that they acquired, by virtue of the arbitration proceedings under the Act, a statutory title to the premises, and the Lord Chief Baron, before whom the civil bill ejectment came on for hearing, stated a case for the King's Bench Division, as to whether the plaintiffs are entitled to recover possession of these premises in their ejectment. We have not to consider whether or how the plaintiffs may proceed to acquire this plot if they have not done so, nor have we to consider the position which would arise if the plaintiffs had lodged the purchase-money in the Court, on the ground that no title had been shown.

The question for determination is, whether the plaintiffs, by virtue of the provisions of the statute, and the arbitration proceedings taken under it, acquired the title to the defendant's lands, though he got no notice and made no claim, and was, in fact, an entire stranger to the arbitration proceedings.

An Act of Parliament could produce such a result, but it would require clear words to accomplish it, and it is deserving of notice that though the schedule to the Housing of the Working Classes Act is identical in terms for all material purposes with the Railways Act of 1851—now over fifty years in force—no such contention was ever raised on that statute.

Serjeant Dodd, however, contended that the provisions of the articles in the schedule were strong enough and clear enough to vest the title to Henderson's lands in the plaintiffs, even though he was an entire stranger to the proceedings. This depends on the construction of the articles. Clause 1 was relied on because

it deals with all lands proposed to be taken, as no doubt the lands in question were; but the real difficulty is not whether they were desired to be acquired, but were so in fact. It is not pretended that Article 6 was complied with by giving or sending the notice to the defendant, who, in fact, was the person interested. No compensation was assessed for him, and no claim was made.

The words in Article 9, "binding and conclusive upon all persons whomsoever," were relied on; but these are used in reference to the persons between whom the arbitration takes place, and there never was a dispute between the plaintiffs and Henderson. Then comes the provision for notice to persons interested to make claims and state their titles. None was furnished by Henderson. Articles 14–19 were those most strongly relied on.

If the local authority consider that the claimant, on his statement of title furnished, is absolutely entitled to the lands, they are to deliver him a certificate stating the amount of his compensation, and pay it. Such certificate was given in this case, but not (as regards this defendant) to the real owner. Then comes Article 18 [His Lordship read the Article]. The words are "upon obtaining such receipt as hereinafter mentioned," which refers us to Article 19 [His Lordship read the Article]. It is not suggested that Henderson claims under Galbraith, and the conveyance of Galbraith, which in this case was actually executed, of course passed his estate. It was, as the receipt would have been, "an actual conveyance of such estate or interest." But then what appears to me to be almost conclusive is that under Article 20, the provisions of the Lands Clauses Act, 1845, other than those under the heading with respect to the purchase and taking of lands otherwise than by agreement, all apply, and Article 13 of the schedule expressly refers to section 124 of the Lands Clauses Act, showing that after everything had been carried out under the schedule, the local authority might through mistake or by inadvertence have failed to purchase or make compensation for an estate, right, or interest in some portion of the scheduled lands, and section 84 of the Act of 1845 prohibits the promoters from entering upon lands required till they have paid to every party having any interest in the lands the compensation awarded.

There are special provisions in the Act and Schedule under

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which an entry may lawfully be made, but which are not material to this case. The case of *In re Parkinson* (1) is in substance undistinguishable from the present. We are, of course, at liberty to review the decision of Mr. Justice Madden, but I think, after full consideration, it was right. I am unable to find any provision in the Articles in the Schedule read in connexion with the subsisting clauses of the Act of 1845, or even in the Articles alone, sufficient to vest the property in the land in question in the plaintiffs. The ejectment therefore fails, and the appeal must be dismissed with costs.

PALLES, C. B. :—

I agree with the Lord Chancellor.

Upon the first question argued, I am of opinion that the only estate which passed to the plaintiffs was that which was vested in the trustees of John S. Galbraith ; and that the estate of the defendant, Willliam Henderson, in the land sought to be recovered, was an "omitted interest," within the meaning of section 124 of the Lands Clauses Act, 1845, which is incorporated in the Housing of the Working Classes Act, 1890. See second Schedule to that Act, Article 13.

The answer to the question depends upon the meaning and effect of Article 18 in that second Schedule. It provides that "when and so soon as the local authority have paid to the party to whom any such certificate as aforesaid is given . . . the amount specified to be payable by such certificate, . . . it shall be lawful for the local authority, upon obtaining such receipt as hereinafter mentioned, . . . to enter upon any lands in respect of which such certificate is given, and thenceforth to hold the same for the estate or interest *in respect of which* the amount specified in such certificate was payable."

These words, "the estate or interest in respect of which the amount specified in such certificate was payable," may have one or other of two meanings. They may mean either—(1) the estate or interest of the person who was awarded the compensation, or (2) the estate or interest which he represented that he had, and in respect of which the compensation was given.

(1) [1898] 1 I. R. 390.

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In the present case the vendors represented that they had the fee-simple in possession, and the money was paid in respect of that fee-simple; and, therefore, were there nothing in the statute to qualify the meaning and effect of the words I have referred to, it might have been held that the fee-simple in possession passed, and that consequently the plaintiffs were entitled to recover. But two subsequent Articles of the same Schedule materially qualify the meaning of these words, and, in my opinion, show clearly that their meaning is "the estate or interest of the person to whom the certificate was given, and of all parties claiming under or through him."

The Articles I refer to are the 19th and 20th. The 19th provides that "in every case in which any moneys are paid by any local authority under this Act for such compensation as aforesaid, the party receiving such moneys shall give to the local authority a receipt for the same, and such receipt shall have the effect of a grant, release, and conveyance of all the estate and interest *of such party*, and of all parties claiming under or through him, in the lands in respect of which such moneys are paid . . ."

Of course this Article must be read in conjunction with the 18th, so as to make the Schedule a homogeneous whole. Reading them together they direct five things: (1) payment of the moneys; (2) receipt by the party receiving them; (3) the effect of the receipt as a conveyance; (4) the right to enter upon the lands; (5) the direction to hold the same for the estate or interest in respect of which the moneys were paid.

To render this code homogeneous, the estate or interest for which the lands are provided to be held must be taken as identical with the estate or interest which the receipt is to have the effect of conveying: *i.e.*, the estate or interest of the party giving it, and of those claiming under or through him.

This construction, which, without any assistance from other Articles, would appear to be sufficiently clear, is made certain by Article 20, which provides that if it appears to the local authority from the statement and abstract of title, or "otherwise," that the person making the claim is not absolutely entitled to the lands, estate, or interest in respect of which his claim is made, or if the title to such lands, estate, or interest be not satisfactorily deduced to the local authority, then the authority may pay the money into

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the Court of Chancery. Thus the onus of satisfying themselves of the title of the person to whom the payment is made, to the lands, or to the estate or interest therein in respect of which it is made, is thrown upon the local authority.

The second argument urged by Mr. Serjeant Dodd was that, even assuming that the estate of the defendant had not been acquired by the plaintiffs, they were entitled to recover, by reason of that estate being an interest omitted to be purchased; and for that purpose he relied on section 124 of the Lands Clauses Act, 1845. That section enacts that if, after the promoters shall have entered upon any lands, any party shall appear to be entitled to any estate affecting such lands which the promoters shall, through mistake or inadvertence, have failed or omitted duly to purchase or to pay compensation for, then the promoters shall remain in the undisturbed possession of such lands, provided that within six months after the right to the estate or interest shall have been finally established by law in favour of the party claiming the same, the promoters shall purchase the interest.

In support of his contention, Mr. Serjeant Dodd referred to *The Caledonian Railway Co.* v. *Davidson* (1), *Carr* v. *Metropolitan Board of Works* (2), and *In re Shaw and the Corporation of Birmingham* (3).

In the last-mentioned case, Chitty, J., held that a local authority purchasing under this Act should pay interest upon the purchase-money when they had accepted the title, if they had the right, upon that payment being made, of entering into possession. That decision was based on the ground that in an ordinary case between vendor and purchaser, in the absence of express provision, a purchaser is bound to pay interest from the time when he could prudently take possession, and that that rule had been applied by Sir George Jessel in *In re Pigott and Great Western Railway Co.* (4) to the *quasi* contract created by the Lands Clauses Act where lands were taken compulsorily.

Mr. Serjeant Dodd relied upon this case, as showing that the plaintiffs in the present case should be deemed to have actually

(1) [1903] A. C. 22.
(2) 14 Ch. D. 807.
(3) 27 Ch. D. 614.
(4) 18 Ch. D. 146.

taken possession of the lands included in the ejectment. But the decision was not that they were to be held to have entered into possession at the time they were entitled to do so, but that they were bound to pay interest on the purchase-money as if they had entered. *The Caledonian Railway Co.* v. *Davidson* (1) is an authority that, had the plaintiffs here taken possession, they would not have been trespassers, and would have been entitled to the benefit of the 124th section, but it goes no further; and *Carr* v. *Metropolitan Board of Works* (2) decided no more than that the proceedings before the arbitrator there were regular. It was a case in which a person whose name was not mentioned in the claim intervened before the arbitrator, and was awarded compensation. None of these authorities touch the question before us. Apart from these authorities, the clear answer to this contention is that, in the present case, the plaintiffs have not entered into possession. The form of the proceedings—that of ejectment—admits that they are not in possession; and there is no statement in the case that they ever were in possession. The provision in section 124 is intended to be a shield of protection for persons who have entered into possession, and not a weapon of offence against one who has not quitted possession.

The decision of the King's Bench Division must, therefore, be affirmed.

HOLMES, L.J.:—

Once the facts of this case are ascertained, there can be, I think, no doubt of how it ought to be decided. The plaintiffs being authorised by a Provisional Order of the Local Government Board for Ireland of the 30th April, 1901, and an Act of Parliament confirming the same, to take by compulsory purchase certain lands, including the premises mentioned in the civil bill in respect of which the case is stated, proceeded to take the steps prescribed by the second Schedule of the Housing of the Working Classes Act, 1890, to acquire such lands. The premises in question consist of 1A. 3R. 33P., which have been found by the learned Judge by whom the case is stated to have been in the possession of the defendant for such period of time prior to the 30th April, 1901, as to give

(1) [1903] A. C. 22. (2) 14 Ch. D. 614.

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him a good title thereto for the residue of the term of a lease under which he holds certain adjoining lands. The premises were included in the maps and schedules prepared and deposited pursuant to the first Article of the Schedule, but the name of the defendant was not given therein as an owner or reputed owner, lessee, or reputed lessee, or occupier; nor was any notice left at his house or sent to him by post, as prescribed by the 6th Article. It does not appear that he had otherwise any knowledge that the plaintiffs sought to acquire his premises; and it is found in the case stated that he delivered to the plaintiffs no claim in respect of any interest therein. In these circumstances the arbitrator, duly appointed, awarded a sum of £264 as the price to be paid for the purchase of the several interests in the lands specified and described in the schedule thereto, including the premises in question; and on the 3rd March, 1902, the plaintiffs gave a certificate in pursuance of Article 14 that the amount thus awarded was payable to W. H. Scott, Charles Webb, and A. A. Rathborne, as trustees of the estate of John S. Galbraith. On the following 4th July, these gentlemen, on being paid the price named in the award, conveyed to the plaintiffs the scheduled lands, which, as I have already said, included the premises in question, and for the recovery of which the civil bill was subsequently brought.

The title of the plaintiffs depends, as I understand the argument of their counsel, on the effect of the certificate, the payment of the money thereunder, and the receipt given therefor. If those documents do not enable the plaintiffs to recover, the conveyance does not help them. I turn, then, to the provisions of the schedule, upon which, as I think, the District Council must rely if they are to succeed in these proceedings. Article 18 provides that when, and so soon as, the local authority has paid the certified amount to the persons certified to be entitled, it shall be lawful for the local authority, upon obtaining such receipt as is thereinafter mentioned, to enter upon any lands in respect of which such certificate is given, and thenceforth to hold the same for the estate or interest in respect of which the certified amount was payable. If this Article were taken by itself, its construction might be ambiguous; but Article 19 makes the meaning clear, by enacting that the receipt shall have the effect of a grant, release, and conveyance

of all the estate and interest of the party to whom the certificate is given, and of all parties claiming under or through him in the lands in respect of which the moneys are paid, subject to certain provisions as to an *ad valorem* stamp. It seems to me to follow that this is the effect, and the only effect, of the certificate, of payment of the certified sum, and of the receipt therefor; and as the defendant, so far from claiming through or under the persons by whom the receipt was given, claims adversely to them, it has not the effect of a grant, release, and conveyance of the defendant's interest.

I decide the appeal on this ground alone, because in the circumstances it is not necessary to consider the other enactments referred to in the course of the arguments. I offer no opinion as to the provisions dealing with omitted interests, or with the payment into Court of the sum awarded. It would not be difficult to show that these provisions support the view I have taken, and they are certainly not against it. Questions as to their effect may, however, hereafter arise, which I do not wish to anticipate. Neither *In re Parkinson* (1) nor *Doyne's Case* (2) is similar to the present; and while I am not to be understood as expressing any doubt as to the soundness of these decisions, I reserve the right to reconsider the questions of law that arose in them, if at some future time they are discussed in this Court.

Solicitors for the plaintiffs: *Shields & Murnaghan.*
Solicitor for the defendant: *W. E. Orr.*

R. ST. J. C.

(1) [1898] 1 I. R. 390. (2) 24 L. R. Ir. 287.

K. B. Div. 1905.
Nov. 3, 13.
Appeal. 1906.
May 3.

M'NEILL *v.* MILLEN & CO., LIMITED (1).

Negligence—Representation—Estoppel—Statement made in the course of business—Reasonable care—Insurance.

M'N., whose motor car was being repaired at the works of M. & Co., communicated to M. & Co. his intention to effect a policy of insurance against the destruction or injury of the motor car by fire while on their premises. Thereupon M. & Co., as was found by the jury at the trial, negligently, carelessly, and without due and proper care, represented to M'N. that they had insured the car for him, which, in fact, they had not done, in consequence of which representation M'N. refrained from insuring the car. The car, with other goods (which were, in fact, insured) on the premises of M. & Co., was afterwards destroyed by fire, and M. & Co. were paid the insurance money in respect of the goods actually insured:—

Held, by the King's Bench Division and the Court of Appeal, that, on the state of facts so found, M'N. was entitled to recover damages from M. & Co. for the loss of his car.

MOTION by plaintiff and cross-motion by defendants, to have judgment entered for them respectively upon the findings of the jury at the trial, which took place at Belfast, before the Lord Chief Baron and a common jury, at the Summer Assizes, 1905. The action was brought to recover damages for the loss of a motor car which the plaintiff had left for repair with the defendants, and which was destroyed by a fire that took place upon their premises. There was a counter-claim by the defendants for £74, the price of the repairs executed by them to the motor car.

The defendants, who were mechanical engineers, were the proprietors of the Sydenham Works, Belfast, and on 1st July 1904, had received the plaintiff's motor car on the premises under an arrangement whereby it was to be put in thorough running condition within a week. The car, which had been constructed by the plaintiff himself, had cost the plaintiff, prior to that date, £13

(1) In the King's Bench Division, before LORD O'BRIEN, L.C.J., and MADDEN and WRIGHT, JJ.

On the 11th July, and several subsequent occasions, the plaintiff called at the Sydenham Works for the car, but it was not finished. Every time he went the defendants informed him that there was still something wrong. When he visited the Sydenham Works on 27th October, he saw Stavely Macnamara, the manager, and John Whaley, the manager of the electrical department. He informed them that he was taking out a policy of insurance to cover the car against fire. Mr. Macnamara said that it was not necessary, as they had taken out a policy for £300 a few days previously, £200 of which they had put opposite plaintiff's car, the other £100 covering some goods they had from other people. On the faith of this statement the plaintiff did not insure the car. A fire took place at the Sydenham Works on the 15th December, 1904, and the plaintiff's car was completely destroyed. It then appeared that, although a policy of insurance was effected by the defendants about the time stated by Macnamara in his interview with plaintiff on 27th October, this policy did not cover the plaintiff's car, and Macnamara's statement that the policy did cover the plaintiff's car was a mistake. A considerable portion of the evidence at the trial was directed to the question of whether the fire in which the car was destroyed was due to the defendants' negligence in allowing gas to burn all night under a certain stove on the premises, and in allowing an escape of gas; but these two allegations of negligence were negatived by the jury, and nothing turned upon this branch of the case in the Divisional Court.

The statement of claim upon which the case came to trial relied upon a false and fraudulent representation to the plaintiff that the defendants had taken out a policy of insurance to cover the motor car against loss or injury by fire while on their premises, but, by leave of the Lord Chief Baron at the trial, the plaintiff was allowed to amend by adding a paragraph that "the defendants, then well knowing that the plaintiff was about to insure the said car against loss or injury by fire while in the custody of the defendants, negligently, carelessly, and without due and proper care represented to the plaintiff that the defendants had insured the said car for the plaintiff, whereas in truth and in fact the defendants had not insured the said car for the plaintiff, or at all,

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and the plaintiff, relying on said representation, refrained from insuring the said car, which was on the 15th day of December, 1904, destroyed by fire while in the custody of the defendants."

The following were the questions submitted to the jury, and their answers :—

1. Was the fire caused by the negligence of the defendants, either—(*a*) By the defendants negligently allowing the gas to remain burning under the stove at night? *Answer*—No. (*b*) By negligently permitting an escape of gas? *Answer*—No.

2. Did the plaintiff employ the defendants to put his car into thorough running condition? *Answer*—Yes.

3. If so, had a reasonable time for putting it into such thorough running condition elapsed before the fire? *Answer*—Yes.

4. Did the defendants represent to the plaintiff that the motor car was insured for him? *Answer*—Yes.

5. Was such representation made negligently, carelessly, and without due and proper care? *Answer*—Yes.

6. Was it by reason of such representation that the plaintiff refrained from insuring the said car? *Answer*—Yes.

7. Assess the plaintiff's damages. *Answer*—£134, which includes Messrs. Millen & Co.'s account.

Serjeant Dodd (with him *M'Afee*), for the plaintiff.—

The plaintiff is entitled to judgment. Bearing in mind the relations between the plaintiff and the defendants as proved by the evidence, it was a reasonable thing for the defendants to insure the motor car, and it was a breach of duty not to have done so. "In the case of a workman for hire, ordinary hazard alone is not the limit of his responsibility; he is bound so to exert himself as to preserve the thing bailed from any unexpected danger to which it may be exposed. Of a warehouseman reasonable and common care of any commodity entrusted to his charge is exacted": see the note to *Clarke* v. *Earnshaw* (1). *Lilley* v. *Doubleday* (2) was a case in which a warehouseman changed the goods from the particular place in which he had contracted to store them. There

(1) 21 R. R. 790. (2) 7 Q. B. D. 510.

was no question of negligence, but the warehouseman was held liable to the bailor for the value of the goods. By the statement of Macnamara, their agent, the defendants are estopped from denying that they had insured the car, and that a sufficient sum to cover the loss of the car was in their hands for the plaintiff. Whatever may have been the original terms of the contract of bailment, there was a new term added to keep the car insured, arising out of the delay in completing the car and the conversation between the plaintiff and Macnamara: see also Jones on Law of Bailment, page 119, and Beven on Negligence (ed. 1889), pages 464 and 497.

Chambers, K.C., and *M'Ilroy* (with them *M'Grath, K.C.*), for the defendants:—

Judgment should be entered for the defendants: *Clarke* v. *Earnshaw* (1) has no application here, because there was a finding of negligence that the defendant did not take care of the goods.

In *Lilley* v. *Doubleday* (2) there was a breach of an express contract to store the goods in a particular place. The plaintiff's complaint does not go farther than this, that the defendants' employee made a mistake in saying that the motor car was insured. "The doctrine of equitable estoppel by representation is a wholly different thing from contract, or promise, or equitable assignment, or anything of that sort." It is in short only a rule of evidence: see judgment of Lord Selborne in *The Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (3). This is an attempt to found an action on estoppel, which cannot be done. It is now well settled that estoppel is only a rule of evidence; an action cannot be founded on estoppel. See also the judgment of Bowen, L.J., in *Low* v. *Bouverie* (4).

M'Afee, in reply, cited a passage from the judgment of Lord Esher, M.R., in *Seton* v. *Lafone* (5), which is quoted in the judgments.

Cur. adv. vult.

(1) 21 R. R. 790.
(2) 7 Q. B. D. 510.
(3) L. R. 6 H. L. at p. 360.
(4) [1891] 3 Ch. 81, at p. 105.
(5) 19 Q. B. D. 68, at p. 72.

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Nov. 13.

LORD O'BRIEN, L.C.J.:—

This is not an uninteresting case. Before I state the net question we have to determine I shall very shortly refer to the facts. It appears that the plaintiff, M'Neill, entrusted to the defendants a certain motor car to be repaired. The motor car was consumed by fire, and now a controversy has arisen as to whether the defendants are indebted to the plaintiff in respect of that event. It is hardly necessary to refer to the evidence. I shall just read this passage from the evidence of the plaintiff—"I saw Mr. Macnamara, their manager, and Mr. Whaley, the manager of their electrical department, at the Sydenham Works, and I said I was taking out a policy to cover the car against fire. Mr. Macnamara said it was not necessary, that they had taken out a policy for £300 a few days previously, £200 of which they had put opposite to my car, the other £100 covering some goods they had from Baird. On the faith of that I did not insure." The case was originally rested upon an allegation of negligence that the defendants did not take reasonable care of the car while on their premises, but that has been negatived by the jury. It is said that the plaintiff is entitled to a verdict upon certain other findings, taken with great care by the Lord Chief Baron, and apparently based upon the portion of the evidence which I have read. Now, putting out of consideration the earlier questions submitted to the jury, I apply myself to findings 4, 5, and 6. Number 4 is this—"Did the defendants represent to the plaintiff that the motor car was insured *for him*?" I emphasize the expression "for him": it seems to have been deliberately inserted by the Lord Chief Baron. *Answer*—"Yes." No. 5. "Was such *representation* made negligently, carelessly, and without due and proper care?" *Answer*—"Yes." No. 6. "Was it by reason of such representation that the plaintiff refrained from insuring the said car?" *Answer*—"Yes." These are the material questions. What do they amount to? That there was a representation made that a certain state of things existed in point of fact—viz. that the motor car was, in fact, insured *for him*, a distinction which is important, having regard to Lord Cranworth's judgment in *Jorden* v. *Money* (1); distinguishing the previous decisions. It was not a

(1) 5 H. L. Cas. 185.

case of mere promise or statement of intention; it was a representation of a matter as actually existing.

I think it was the duty of the defendants in this business transaction to take reasonable care that the statement they made, that the car was insured, was true; and I am of opinion that, inasmuch as they did not discharge their duty in this respect, the action can be sustained on the 4th and 5th findings: see Lord Esher's statement of the law in *Seton* v. *Lafone* (1). This cause of action would rest on a breach of duty—the negligent omission to see that their statements, made in the course of business, in a business transaction, were well founded. This would be a cause of action irrespective of estoppel; but I own I prefer to rest my judgment on the ground of estoppel. This was plainly the ground upon which the Lord Chief Baron thought the plaintiff's case should be rested, and it was in order to give effect to this ground that he added the additional paragraph to the statement of claim; and what is meant by the estoppel in this case is that the defendants were, having regard to the findings of the jury, estopped from denying that the evidence established the plaintiff's claim, as put forward in this amended paragraph. This is the way Lord Bowen, in the case cited (*Low* v. *Bouverie* (2)), dealt with the topic of estoppel, as to estoppel not being in itself a cause of action, but merely a rule of evidence. On this question of estoppel all the findings of the jury are relevant, especially the 6th, to which, perhaps, an additional degree of importance should be attached; but I omit no one finding. The 6th finding is a finding that the representation made was the efficient cause, the *causa causans* of his not having insured himself. You have, then, in these findings a representation of fact plainly intended to be acted upon, and you have the representation in fact acted upon.

The leading case on this subject is *Freeman* v. *Cooke* (3), and it is there laid down that "whatever a man's real meaning may be, if he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth." A host of other cases proceeded on the same lines; but there is a case which seems to be of considerable impor-

(1) 19 Q. B. D. at p. 72. (2) [1891] 3 Ch. at p. 105. (3) 2 Ex. 654.

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tance, *Carr* v. *The London and North-Western Railway Company* (1)—of importance because this doctrine of estoppel or representation was gone into at great length. In that case the plaintiff received notice from the defendant railway company that they had three parcels of goods in their possession consigned to him. Thereupon, he instructed his broker to sell the three parcels. The three parcels were sold, and rent and charges due upon them were paid by the broker to the railway company. Only two parcels were, in fact, delivered to the railway company, and they discovered this two days after they had given the original notification to the plaintiff, but they did not correct the original advice, by stating that only two parcels had been in fact received, until after the sale and the payment of their charges. The plaintiff had to make good to his vendees the difference between the price of the third parcel and the price of the goods which they had to buy in substitution for it. It was held that the railway company were not estopped from showing that the goods had never reached their hands, and that they were not liable to the plaintiff for the difference.

In this case you have the very thing which was not in *Carr* v. *London & North-Western Railway Co.* (1), because you have here established that the efficient cause of his not insuring was the representation made by the defendants. Now, in *Carr* v. *London & North-Western Railway Company* (1) the Court discussed at great length estoppel, and they laid down a number of propositions, amongst others this—"Another recognized proposition seems to be, that, if a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts." This is applicable to this case. A representation was made that the car was in fact insured for the benefit of the plaintiff, that there was a policy, portion of which had been placed opposite his car, and which in fact insured the money for him. It is clear that the person who made the representation intended it to be acted upon, and it was in fact acted upon, for, so to speak, the manner

(1) L. R. 10 C. P. 307.

of acting was refraining from acting—refraining from insuring. The defendants must make good the representation that the insurance which existed was an insurance for the plaintiff's benefit, and that the money to be paid under it would be available for the plaintiff.

On this ground also I am of opinion that the plaintiff is entitled to succeed for the amount in question.

MADDEN, J.:—

I concur with the Lord Chief Justice in holding that the defendants are estopped from denying that the motor car was not only insured, but insured for the plaintiff. The defendants' counsel have contended that estoppel is not sufficient to support the plaintiff's action. Estoppel, they say, is only a rule of evidence, and cannot of itself be the foundation of an action. The thing the defendants are estopped from denying is, they contend, *nudum pactum*, inasmuch as they were not bound to insure the car for the plaintiff. I am not to be taken as deciding that there was no consideration for the insuring of the car, having regard to the agreement between the parties. But the answers of the jury to the 5th and 6th questions render it unnecessary to consider that question. The defendants may not have been under a legal obligation to insure the car. But there was, in my opinion, a duty cast upon them to take reasonable care that a statement made in the course of business, likely from its nature to affect conduct, was in accordance with fact. In the words of Lord Esher, M.R.:—"If a man, in the course of business, volunteers to make a statement on which it is probable that, in the course of business, another will act, there is a duty which arises towards the person to whom he makes that statement. There is clearly a duty not to state a thing which is false to his knowledge, and further than that, I think there is a duty to take reasonable care that the statement shall be correct": *Seton* v. *Lafone* (1). The jury have found that the representation that the car was insured for the plaintiff was made negligently, carelessly, and without due and proper care, and further that it was by reason of such representation that the plaintiff refrained from insuring his car. The fact that the plaintiff has, as a consequence of the representation, altered his position

(1) 19 Q. B. D. 68.

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to his loss, brings into operation the principle of representation. The defendants are bound to make good the representation thus acted upon, apart from any consideration in regard to the original action of the defendants in insuring the car.

Wright, J.:—

At the trial certain questions were submitted by the learned Chief Baron to the jury, and were answered by them. In the result, no judgment was given for either plaintiff or defendants, but the parties were left to apply to the Court for judgment on the findings. Leave was also given at the trial to amend the statement of claim, and a further count (7th paragraph) was added by way of amendment. The Chief Baron, in his report, states the view which he formed at the trial. He says—"(1) I thought the defendants were estopped from denying the truth of the statement made by them, through Mr. Macnamara, to the plaintiff, and that as they had admittedly received the amount of the policy, a sufficient part of that amount would be conclusively taken to have been received by them as against the plaintiff's car; (2) I thought that the effect of the conversation with Mr. Macnamara was to raise an implied promise by the plaintiff to reimburse the defendants the premium on £200, part of the amount insured, and that the promise was a sufficient consideration for the implied promise by the defendants that they would apply the policy-money, to an extent not exceeding £200, in making good to the plaintiff any injury which might be caused to the car by fire; (3) I thought that the effect of the conversation was to alter the terms upon which the defendants held the car as bailees, so as to include a term that they should keep it insured for the plaintiff, or, at least, use reasonable care to keep it so insured." On a consideration of the evidence, I do not think that the second and third theories there enunciated can be sustained. It was no part of the original duty of the defendants as bailees arising out of their employment to insure the motor car. It has not, indeed, been seriously contended that any such duty or obligation rested upon the defendants, and nothing that afterwards occurred between the parties had the effect of altering or enlarging the defendants' duty towards the plaintiff so as to impose on them a liability not originally undertaken to insure the car.

The suggestion of a contract by the defendants to insure, founded on an implied promise by the plaintiff to the defendants to reimburse them the premium of £200, part of the amount insured as covering the motor car, is not borne out, and cannot be inferred from what occurred between the parties. The idea that the plaintiff was to contribute towards the payment of the premium never, I am convinced, crossed the mind of either party, plaintiff or defendants. Accordingly, the plaintiff's right to recover must rest, if at all, upon the first view put forward by the learned Chief Baron.

I therefore refer shortly to the evidence and the findings of the jury. The plaintiff swore that while the motor car was at the defendants' works some time in October, he saw and had a conversation with Mr. Macnamara, defendants' manager, and who must, on the evidence, be taken to have had full authority to act for the defendants. In the course of that conversation the plaintiff said to Mr. Macnamara that he was taking out a policy to cover the car against fire, and Mr. Macnamara's reply was that it was not necessary, that they (the defendants) had taken out a policy for £300 a few days previously, £200 of which they had put opposite the car; and on the faith of that statement he (the plaintiff) did not insure. This evidence of the plaintiff is corroborated by the evidence of a Mr. Whaley, electrical engineer, in the employment of the defendants, and of Mr. Macnamara, who says: "On October 27th, when plaintiff told me he was going to insure his car, I said that we had already insured it for him." As a matter of fact, the car was not covered by a policy which about this time was effected by the defendants. On this evidence the jury found, as they were fully justified in doing, (4th finding) that the defendants represented to the plaintiff that the motor car was insured for him; (5th finding) that this representation was made negligently, carelessly, and without due and proper care; and (6th finding) that it was by reason of such representation that the plaintiff refrained from insuring the car. The jury have by these answers found that a representation, that they had insured the motor car for the plaintiff, was made by the defendants to the plaintiff negligently and carelessly, and was acted upon by him to his loss. Those findings, in my opinion, amount to a verdict for the plaintiff for the loss he has so sustained.

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It was said that there was no duty on the part of the defendants to make this statement, any more than there was any duty on them to insure the car; but, as between parties situated as plaintiff and defendants were, bailor and bailee, it was proper and natural to discuss this most material question of insurance, and it lay on the defendants to state what was true and in accordance with the fact, and to take reasonable care that there should be no misstatement of fact which could or might mislead or prejudice the plaintiff. In the language of Lord Esher, M.R., in *Seton* v. *Lafone* (1)—"If a man in the course of business volunteers to make a statement, on which it is probable that in the course of business another will act, there is a duty which arises towards the person to whom he makes that statement. There is clearly a duty not to state a thing which is false to his knowledge; and, further than that, I think there is a duty to take reasonable care that the statement shall be correct."

Here we have it established by the evidence and found by the jury that the plaintiff acted on the defendants' statement that they had the motor car insured for him, and that, relying on that statement, he did not himself insure, and in consequence suffered loss. This is a case of a representation made by one party to the other in the course of business, meant to be acted on, that representation being false in fact and made carelessly, *i.e.* without due care having been taken to ascertain whether the statement was true or false, and acted on by the party to whom it was made to his loss. In my opinion, the general principle of estoppel clearly applies, and, accordingly, I hold that the defendants are estopped from denying that they had insured the motor car for the plaintiff to the extent of £200, and that the plaintiff properly claims, and is entitled to recover, damages, on the ground that the defendants are estopped by the representation so made by them to the plaintiff, and acted upon by the latter to his loss, which the defendants must make good. These damages have been ascertained by the jury to be the sum of £134, from which must be deducted the amount of defendants' claim for work done on the motor, which, it was admitted, came to the sum of £74.

J. L.

(1) 19 Q. B. D. at p. 72.

The defendants appealed (1).

Bates, K.C., *Chambers, K.C.*, and *McIlroy*, for the appellants.

Serjeant Dodd, *Ronan, K.C.*, and *M'Afee*, for the plaintiff, were not called on.

SIR SAMUEL WALKER, C. :—

We do not require to hear counsel for the plaintiff, as we think the findings of the jury are quite relevant and sufficient to sustain the view of the Court [His Lordship, after stating the facts, proceeded :—] A deliberate statement of fact was made by the defendants' manager, regarding a business matter, on which the plaintiff acted. *Seton* v. *Lafone* (2) shows the binding character of that statement on the defendant. There is abundant admission of the terms of the original contract, and that is the most satisfactory ground, I think, on which to rest our affirmance of the view of the jury, without rejecting the view on which the decision of the King's Bench proceeded. In my opinion the appeal should be dismissed.

FITZGIBBON, L.J. :—

I disclaim differing from anything decided by the King's Bench ; the only difference between us is as to the ground of legal liability, which I hold to be contract.

As between bailor and bailee the relation is contractual ; one party stating to the other the terms of the contract, must be taken to do so with reasonable care. The jury found that the statement was made that the plaintiff's car was insured, and that an insurance effected by the defendants was enuring for the plaintiff's benefit. That this statement was made without reasonable care, or without foundation in fact, cannot do away with its effect as between the parties, nor can there be absence of consideration, when the statement was acted upon by the bailor, and the car was left by him in

(1) In the Court of Appeal, before SIR SAMUEL WALKER, C., and FITZGIBBON and HOLMES, L.JJ

(2) 19 Q. B. D. 68.

Appeal. 1906.

M'NEILL v. MILLEN.

the bailee's possession upon the faith of it. *Facio ne facias* is just as good, by way of consideration, as *Facio ut facias*.

HOLMES, L.J. :—

I concur. I am clear that the result of the conversation in October was, that the car was retained by the defendants on the terms that it was insured. It was stated to the plaintiff by the defendants' manager that the car was there on those terms, and, accordingly, the plaintiff took no further step.

Solicitor for the plaintiff : *George Allen.*
Solicitors for the defendants : *Galway & Boas.*

R. D. M.

WATSON *v.* PORTER (1).

(1906. No. 9941.)

Appeal.
1906.
Oct. 27.

Practice—Security for costs—Seafaring man—Residence in England—Ord. XXIX., Rr. 1 and 2.

The plaintiff, in an action for an alleged slander, was a sea-captain, who resided, when not absent on a voyage, in a house in Liverpool, the property of his mother-in-law, for which he paid no rent. The alleged slander arose out of a dispute between the plaintiff and the owners of his former ship, from which he had been dismissed without payment of the balance of his wages as captain; and a second action was pending between the plaintiff and the owners of the ship (of whom the present defendant was one), in which the plaintiff sought to recover payment of such wages:—

Held, by the Court of Appeal (reversing the decision of the King's Bench Division), that the defendant was entitled to require the plaintiff to give security for costs of the action.

Graham v. *Wray* (35 Ir. L. T. R. 237) distinguished.

APPEAL from an order of the King's Bench Division, refusing the defendant's application requiring security for costs from the plaintiff. The action was one of slander. The plaintiff, by his statement of claim, alleged that the defendant falsely and maliciously spoke of him, in relation to his calling of a master mariner, the following words:—"I refuse to return his certificate. . . . He is a downright scoundrel and rogue. . . . I will send his certificate and report his conduct as master to the Board of Trade." The defendant filed an affidavit in support of this summons, by which he alleged that he had a good defence on the merits; that he did not utter the words complained of; that the occasion was a privileged one; that the plaintiff, when in England, lived at Upper Pitt Street, Liverpool, and was a sea captain, who, under the necessities of his trade, had to go abroad from time to time, and as often as he got employment, on long voyages to the South Seas in sailing ships, and that there would be little, if any, probability

(1) Before SIR SAMUEL WALKER, C., and FITZGIBBON and HOLMES, L.JJ.

Appeal. 1906.

WATSON *v.* PORTER.

of his being found, or of his having any goods capable of being seized in execution, should a verdict be found for the defendant, the plaintiff being a man of no visible means; and that the plaintiff, who had been employed as master of the ship "Cumbrian," had brought an action, then pending, against the owners of that ship for wages, in defending which the defendant, as one of said owners, had been put to great expense, and in which action the owners counterclaimed for damages in respect of demurrage, caused by the negligence of the plaintiff. The plaintiff, in an answering affidavit, described himself as of No. 40, Upper Pitt Street, Liverpool, and alleged that the necessities of his profession would not take him abroad until after the trial of the action; that he was then without employment, and was unable to obtain further employment, owing to the manner in which he had been dismissed and slandered by the defendant; and that his admitted lack of means was owing to the conduct of the owners of the "Cumbrian," who had dismissed him without payment of the arrears of wages due to him as master, to recover which the second action had been *bona fide* brought by him. The defendant, in a further affidavit, alleged that the plaintiff lived, when in England, in a house, the property of his mother-in-law, for which he paid no rent, and in which his position was that of a guest.

The King's Bench Division held that they were bound by the decision in *Graham* v. *Wray* (1), and dismissed the summons, hence this appeal.

Serjeant Dodd and *W. H. Brown*, for the appellant:—

Ord. XXIX., R. 2, provides that a defendant shall not be entitled to an order for security for costs "*solely*" on the ground that the plaintiff resides in England; but here there are special grounds for the making of such an order. The plaintiff is a sea-captain, and his calling necessarily requires his absence from England, so that he could not be made amenable to any process of this Court if his action fails. A judgment summons could not be obtained against him, even if he had means: *Johnston* v. *Watson* (2). Further, he has no real residence in England; he is

(1) 35 Ir. L. T. R. 237. (2) [1893] 1 Q. B. 21.

merely a guest in the house his family occupies whilst he is in Liverpool. The bringing of two actions, both of which arose out of the same transactions, was oppressive; and if the plaintiff succeeded in his Admiralty action, his character will be sufficiently cleared, so that there is no hardship in requiring him to give security in the present one.

[They also cited *Martin* v. *Russell* (1), *Chaigneau* v. *Pollock* (2), *Stewart* v. *Stewart* (3).]

Henry, K.C., and *Chadwick*, for the respondent :—

Mere temporary absence in the course of business is not sufficient to bring a plaintiff under the necessity of giving security for costs: *Duff* v. *Hore* (4). The plaintiff is admittedly now out of employment, and he is, therefore, in the same position as any other litigant having a residence in England, and should not be compelled to give security: Ord. XXIX., R. 2. This Court has already decided that poverty of a plaintiff, coupled with residence in England or Scotland, does not entitle a defendant to an order for security: *Graham* v. *Wray* (5). The present case is ruled by that decision. The two actions could not have been combined, and the Court cannot now inquire into the merits of the Admiralty action, which ought not to affect the decision of this summons.

[They also cited *Allain* v. *Chambers* (6), and *Redmond* v. *Mooney* (7).]

SIR SAMUEL WALKER, C. :—

We are all of opinion that this appeal should be allowed. It is clear from the note of the judgment in the Court below, which Mr. Henry has read to us, that the learned Judges in the King's Bench Division did not form an independent view of this case, but considered that they were bound by the decision of this Court in *Graham* v. *Wray* (5). It is true that we there decided that

(1) 21 L. R. Ir. 196.
(2) 32 Ir. L. T. R. 39.
(3) 20 Beav. 322.
(4) Ir. R. 6 C. L. 505.
(5) 35 Ir. L. T. R. 237.
(6) 8 Ir. C. L. R. App. 7.
(7) 14 Ir. C. L. R. App. 17.

Appeal. 1906.

WATSON v. PORTER.

Sir Samuel Walker, C.

the poverty of a plaintiff, coupled with his residence in England or Scotland, does not entitle a defendant to require him to give security for costs. But we are all of opinion that there are special circumstances in this case which distinguish it from *Graham* v. *Wray* (1), and which entitle the defendant to the order he asks for. Ord. XXIX., R. 2, provides that "a defendant shall not be entitled to an order compelling the plaintiff to give security for costs solely on the ground that the plaintiff resides in England or Scotland." Some effect must be given to the word "solely" in that rule. It clearly points to the existence of circumstances which taken in conjunction with a plaintiff's residence in England or Scotland would entitle a defendant to require him to give security for costs. It would be difficult to conceive a case in which a defendant would be so entitled if the present application is to be refused. Here the plaintiff is a sea-faring man, whose occupation in its very nature necessitates his prolonged absence from home, and I am far from being satisfied on the affidavits that he has a residence in England at all; it is sworn by the defendant, and not denied, that the plaintiff stays, when in England, at a house the property of his mother-in-law where his position is that of guest of his mother-in-law, who owns other houses in the same street. That is not the nature of a residence in England, such as is contemplated by Ord. XXIX., R. 2. But another circumstance which influences me strongly in the conclusion I have arrived at is the fact that there is now pending, in the Admiralty Division, a second action between the plaintiff and the owners of the "Cumbrian," including the defendant, which arose out of the same circumstances and involves the same considerations as the present action. It has been urged by plaintiff's counsel that the two causes of action could not have been combined either in the Admiralty or the King's Bench Division; but we cannot close our eyes to the fact that if the Admiralty action, in which the defendants have not sought for an order for security of costs, comes to a hearing and the plaintiff ultimately obtains a verdict, he will have succeeded in clearing his character of the charges he alleges t

(1) 35 Ir. L. T. R. 237.

have been made against him, and such an action as the present will be rendered unnecessary.

We are of opinion that there are here special circumstances which distinguish the case from that of *Graham* v. *Wray* (1), and the appeal must accordingly be allowed with costs.

FITZGIBBON and HOLMES, L.JJ., concurred.

Solicitor for the appellant: *R. J. Porter.*
Solicitor for the respondent: *C. S. Caldwell.*

R. ST. J. C.

M'DAID *v.* BALMER (2).

Appeal. 1906.
Nov. 12.

Parliament—Franchise—Dwelling-house—Service franchise—Part of house separately occupied as a dwelling—Representation of the People Act (48 *Vict. c.* 3), *s.* 3.

The claimant was, along with several others, in the employment of P., who carried on an extensive drapery business in Londonderry. Each of the claimants was to have a yearly salary, and board, and a room to himself, and the sole control over the room. Each of them had a key for his room and a latch-key for the outside door. They had to reside in the rooms allotted to them, but they would not be changed. The employer did not reside on the premises.

The Revising Barrister having admitted the claimants:—

Held (by Lord O'Brien, L.C.J., and FitzGibbon, L.J.; *diss.* Holmes, L.J.), that there was evidence to support the finding that the employees were inhabitant occupiers, and, as such, entitled to the service franchise.

APPEAL from the Revising Barrister for the borough of Londonderry, who retained the names of F. G. Balmer and nine other claimants on the list of voters as inhabitant householders, in respect of one room each on the second and third floors of a house in Ferryquay Street, Londonderry.

(1) 35 Ir. L. T. R. 237.
(2) Before LORD O'BRIEN, L.C.J., and FITZ GIBBON and HOLMES, L.JJ.

Appeal. 1906.

M'DAID v. BALMER.

The following facts were proved :—

1. Their employer, Mr. John Herbert Pollock, gave the following evidence :—"I carry on at 20 Ferryquay Street, under the name of J. J. Pollock & Co., the business formerly carried on there by my father. An assistant named Galley occupied a front room, second flat, on the premises in 1895, but I do not know on what terms, as I did not then interfere with the assistants at all. I do not reside on the premises. I have a housekeeper and her assistant, but they do not look after the employees except to cook their food. The senior assistant, Mr. Davis, turns off the gas and sees that the place is locked at night ; but the door is not locked on the employees, who need not be in at any particular hour. Mr. Davis has no authority over them, except the apprentices. The assistants breakfast in the dining-room. They know that breakfast is ready at half-past eight, but they need not necessarily be down at that hour. No time is fixed for getting up in the morning. The porter does not reside on the premises. He cleans the employees' boots, which are left outside their doors or in the boot-room. The housemaid does up the rooms. The assistants use a reading-room and library combined in common. The sanitary arrangements are used also in common. There is no smoke-room.

2. "F. G. Balmer entered the employment in 1904. In addition to salary and board, it was agreed that he was to have a room to himself, and the sole control of it, and that the room should be attended to.

3. "Was the word 'room' specifically mentioned? It was.

4. "And board and lodging? Board and lodging and his room. He did not see the room before he entered into the agreement, nor did I point it out to him. The senior assistant, whom I had already told, pointed it out. Balmer has the same privileges as the others.

5. "William A. Davis entered the employment before my father's death, but he was not in it in 1895. Since my father's death, between two and three years ago, a new engagement was entered into under which Davis was to have salary and board and a room to himself. He remained in continuous occupation of the same room which he had in my father's time.

6. "Charles W. Holmes entered my employment three years

ago. Besides salary, it was agreed that he was to have board and a room to himself, and all the other conveniences. In the agreement the word 'room' is mentioned. When assistants come for an engagement, I always say:—'You will have a room to yourself and your board.' Holmes did not see the room allotted to him before he came.

7. "Thomas M'Elwee is in my employment since the 1st April, 1905. Besides salary and board, he, too, has a room to himself.

8. "James Y. Simpson (who has been seven years in the employment); Archibald Wilson (three years); Robert Wray (nine years); and John Wall, Thomas A. Kilpatrick, and Robert T. Robinson, are each occupying separate rooms under like terms. They must reside in the rooms allotted to them. If Wray wanted Wall's room, Wall would not be changed. They have each been residing in the same room during the last eighteen months. There is no fixed hour for cleaning the rooms, which is done by the housemaid. If any irregularity as to the way in which any of the employees kept his room were reported to me, I would not inspect the room. In the absence of Mr. Davis the assistant next in seniority would see to the locking of the street door. The premises are insured.

9. "Cross-examined—Each of the assistants has a key for his room, and the control of the room. He has also a latch-key for the outside door. The door would not be locked if any of the assistants happened to be out."

10. The evidence having been read to the witness, he desired to substitute for "board and lodging" the words "a room and his board."

No other evidence was offered.

The Revising Barrister retained the names on the list, and the question for the Court was:—Whether, in point of law, there is evidence to support the right of the voters to be retained on the list as inhabitant occupiers by virtue of service?

Patton (with him *Moriarty, K.C.*), for the appellant.

Henry, K.C., and *Osborne*, for the respondents.

Appeal. 1906.

M'DAID v. BALMER.

LORD O'BRIEN, L.C.J. :—

In this case it is well to keep clear the question which we have to decide, and that is—Whether in point of law, in the light of the decisions relied on, there is evidence to support the right of the voters to be retained on the list as inhabitant occupiers by virtue of service? We are not assuming the functions of the Revising Barrister; we are merely seeing whether there was evidence to justify what he did. I do not at all say that I would have found as the Revising Barrister found, if I had been in his place; that I wish to be very clearly understood. I merely discuss the question whether there was evidence to support his finding.

It was said that this case was governed by *M'Quade* v. *Charlton* (1). I do not think so, because there are special circumstances in this case which distinguish it from *M'Quade* v. *Charlton* (1). I take the second paragraph of the case, and it is there stated that "Frederick G. Balmer entered the employment in 1904. In addition to salary and board, it was agreed that he was to have a room to himself, and the sole control of it, and that the room should be attended to." Paragraph 3, "Was the word 'room' specifically mentioned? It was." It was proved on cross-examination, as mentioned in paragraph 9, "Each of the assistants has a key for his room and the control of the room. He has also a latch-key for the outside door. The door would not be locked if any of the assistants happened to be out." Then paragraph 10 states, "The evidence having been read to the witness, he desired to substitute for 'board and lodging' the words 'a room and his board.'"

Looking at all the facts of the case, and taking it as a whole, and bearing in mind that the claimant specially bargained for and got a room to himself; that he was by contract to have, and had, sole control over it; and that he had the key of his room and a key of the outer door; that he occupied the room exclusively, and that he had a contractual right to it: it appears to me there was evidence to support this decision of the Revising Barrister.

The facts are different from those in *M'Quade* v. *Charlton* (1). In that case, among other distinctions, there was no special pro-

(1) [1904] 2 I. R. 383.

vision as here that the claimant was to have sole control of his room: see also the rules that in that case regulated the occupancy of the sleeping-rooms: *Ladd* v. *O'Toole* (1) does not apply. In that case there was no contractual right to a room at all, and no such sole control and right to exclusive occupation as here.

I think there was evidence to support the finding of the Revising Barrister; but I desire to emphasize once more that the finding is his and not mine.

FITZGIBBON, L.J.:—

In registration cases, as well as in cases under the Employers Liability Act, there may be opposite decisions on the same facts, which the Court of Appeal cannot harmonize, because it is not the tribunal of fact, and there may be sufficient evidence to sustain a finding either way.

The only question here is whether the finding of the Revising Barrister is so much against the evidence as to be insupportable. The Court below, in such cases, has better means of weighing the evidence than we have, and we ought not to interfere unless the preponderance against the finding is overwhelming.

In *M'Quade* v. *Charlton* (2) the Revising Barrister did not make up his mind whether there was sufficient evidence, and he left it to us to draw the conclusion which, strictly speaking, he ought to have drawn. In this case the Revising Barrister has not done that: he has found his own verdict. The real question is—Was the building in Ferryquay Street, in which all these people lived, one dwelling, or more? In *Ladd* v. *O'Toole* (1) Palles, C.B., said "The claimants live in community. They have, in my opinion, *but one dwelling*, and no part of it is used as a separate dwelling-house by any one of the claimants." I ask—Can anyone say, positively—in this case—that each of these rooms, separately occupied as they were, was part of one and the same dwelling with all the rest? Each of these claimants had "a room to himself," "and the sole control of it"; and there was no idea of community among them. Walker, L.J., said "The entire College is the residence or dwelling-house wherein all the members of the

(1) [1904] 2 I. R. 389. (2) *Ibid.* 383.

Appeal. 1906.

M'DAID v. BALMER.

Fitz Gibbon, L.J

community dwell like members of one family." The inhabitants of 20 Ferryquay Street had no such idea. On the contrary, the evidence satisfied the Revising Barrister—reasonably as I think—that in this case there was a *bona fide* contract between the employer and the claimants that each of them was to have a separate dwelling, to be separately occupied, so far as it was possible to have such a thing in a single room. Thousands of cases have decided that a single room may be a "dwelling," or a "dwelling-house." Here each claimant had a key of his own room, and the outer door of the building was never locked if any one of them was out. The house was an aggregate of separate dwellings, without even a common "latch-key." We decided the same question with respect to this house ten years ago, and I see no reason to think that we were wrong.

HOLMES, L.J. :—

The case stated is, I think, unsatisfactory in one respect. It sets out the evidence given before the Revising Barrister, which I assume he accepted as accurate; but he does not find as an inference therefrom that each of the claimants occupied a separate room *as his dwelling-house* during the qualifying period by virtue of his employment. This Court has no jurisdiction to find facts, or to draw inferences of fact; but where an inference of fact is found by the Revising Barrister, it can be asked to say whether there is evidence to support such inference. I gather that the reason for the course thus taken was that the Revising Barrister felt himself bound by two decisions of this Court, *McGrory* v. *Chambers* (*Gatley's Case*) (1) and *M'Daid* v. *Chambers* (*Gatley's Case*) (2), given in cases practically identical with the present, to decide in favour of the voters; and that being so bound, he deemed it sufficient to show that the evidence before him was the same as in the former cases, and that there was no proof of anything new or additional leading to a different conclusion. This is quite intelligible, and if I had been in Mr. Hunt's place, I should probably have taken the same course. But, sitting here, I must remember that in *Ladd* v. *O'Toole* (3) it was held that this Court is not bound by its previous

(1) 1 Lawson, 18. (2) Lawson, 55. (3) [1904] 2 I. R. 411.

decisions in registration cases, and that even where the parties and the facts are the same, it is at liberty, and, indeed, it is its duty, to come to a different conclusion, if further consideration shows that the previous decision was wrong. In *M'Quade* v. *Charlton* (1) we had already acted on this principle; but it was satisfactory to have the view of the Court, as then composed, confirmed by a Court consisting of all the Judges entitled to sit therein.

The difficulty I now feel arises from our decision in *M'Quade* v. *Charlton* (1). In that case, like the present, the claimants were the assistants in a drapery business, occupying each a separate room by virtue of his employment; except that in this case the business was carried on in Londonderry, and in the other it was carried on in Belfast, the facts proved are, in my opinion, substantially identical. No doubt, it is possible to point out one or two minor distinctions which I cannot regard as material. Moreover, in *M'Quade* v. *Charlton* (1) the Revising Barrister drew the inference of fact in favour of the vote; but we, overruling one or two previous judgments, held that there was no evidence to support this inference. Having taken part in that judgment, I should now be prepared to follow it, but, as my colleagues are of a different opinion, the appeal must be dismissed.

Solicitor for the appellant: *John Tracy.*
Solicitor for the respondent: *C. S. Caldwell.*

R. D. M.

(1) [1904] 2 I. R. 383.

Appeal.
1906.

Nov. 13.

LADD *v.* FARRELL (1).

Parliament—Franchise—Change of residence—Place of abode—Wrong description—Power to amend.

Where a succession claim had, in the second column, under the heading "Place of Abode," "House 28–29 Belgrave Square (South), in direct succession from house 4 Clifton Terrace, Ranelagh," and in the fourth column, for the place where the property is situated, "28–29 Belgrave Square (South)":—

Held, that the claim was good as it stood, no one having been misled; but, if not, the Revising Barrister had power to amend it.

Case stated by the Revising Barrister for Rathmines, county of Dublin. Patrick Farrell appeared on the list of claimants as an "Inhabitant Occupier." The form of Notice of Claim, signed by the claimant, contained four columns, which were filled up as follows:—

Surname and Christian Name of the Claimant.	Place of Abode.	Nature and Amount of Qualification.	Townland or Denomination, Street, Lane, or other like place, in this Registration Unit, and Number of House (if any) where the property is situate, or name of the property, or name of the occupying tenant (if any), or, if the qualification consists of a rentcharge, then the names of the owners of the property out of which such rent is issuing, or some of them, and the situation of the property.
Farrell, Patrick,	House, 28–29 Belgrave Square (South), in direct succession from house 4 Clifton Terrace, Ranelagh.	I. O.	28–29 Belgrave Square (South).

Thus filled in, the manner of doing so was a divergence from the heretofore usual manner of filling up these columns, both in the claims and lists, in that the entry here appearing in the second column should have appeared in the fourth column, and the

(1) Before Lord O'Brien, L.C.J., and FitzGibbon and Holmes, L.JJ.

entry appearing in the fourth column should have appeared in the second column. In short, there was a transposition of the entries as usually filled in such claims and lists.

It was admitted on the part of the objector that so filling the columns was a "mere mistake," which had not deceived him, and that the claim would be a good claim in form upon the face of it, if the matters were transposed in the two columns, but he objected (1) that the claim was bad upon the face of it, in that both sets of qualifying premises were not set forth in the fourth column, and that was so notwithstanding the fact that they did appear in the second column; (2) that the Revising Barrister had no power to amend it; and (3) that if he had power to amend it, it was not a claim that he ought to amend.

The Revising Barrister held (1) that the claim upon the face of it was a good claim for a successive occupation out of the premises named in the second column, and alternatively (2) that if he was wrong in this decision it was a claim he should and would amend by transposing the matters as contained in the said two columns. He stated:—"In coming to the above conclusion, I did so having regard to my deciding as a matter of fact that so filling up of the claim was 'a mere mistake' that was calculated to deceive nobody, and had not deceived anybody, as to the nature of the claim intended to be made, *i.e.* a 'succession claim,' and that the claim upon the face of it contained all the information necessary to give due notice of a 'succession claim' if supported by the evidence which I allowed to be given, and thereupon I heard the evidence both in this and the other scheduled claims, and admitted all the respective claimants to the franchise upon the evidence."

Samuels, K.C., and *Boyd*, for the appellant.

Clancy, K.C., and *Muldoon*, for the respondent.

LORD O'BRIEN, L.C.J.:—

We do not call on counsel for the respondent. I confine myself to the facts that appear on the face of the claim. No one was deceived by this claim: it did not, and could not, mislead

Appeal. 1906.

LADD v. FARRELL.

Lord O'Brien, L.C.J.

anyone. The only objection urged against it is that a particular statement does not appear on the part of the claim usually allocated to it, though it appears on the claim taken as a whole. In the column headed "Place of Abode" the house is stated, "28–29 Belgrave Square (South), in direct succession from the house 4 Clifton Terrace, Ranelagh." I think that "28–29 Belgrave Square (South)" in the fourth column can be read in connexion with the statement in the second column. These columns are not to be treated as so many watertight compartments, and taking the claim as a whole, it is a claim in succession from one house to another, both described in the most explicit way. That is exactly what the voter claims, and no one who read the claim would be embarrassed.

I doubt if any amendment was necessary; but if it was, I should have no hesitation in amending the claim myself. It would really appear to me that any attempt to amend would be only an effort to make clear what was already explicit.

FITZGIBBON, L.J. :—

I concur. This case does not go further than previous decisions.

In *Porter* v. *Holland* (1), we held that a blank in the third column might be filled by inserting the words "inhabitant occupier," because "dwelling-house" was already in the fourth column.

In *Patrick Gallagher's Case* (2), "31 Bridge Street" was put into the fourth column, being taken from the second, where the dwelling-house was described also as the "Place of Abode."

In this case I do not think that any amendment was necessary, because, reading the whole document together, I think it is a claim to have lived during the qualifying period in Belgrave Square and Clifton Terrace successively, and any objector must have known that the voter claimed as an inhabitant occupier of the house in Belgrave Square in succession from the house in Ranelagh.

(1) 2 Lawson, 150. (2) 2 Lawson, 107.

HOLMES, L.J. :—

Appeal.
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I am of opinion that the notice of claim shows on its face that the nature of the qualification relied on was that of inhabitant occupier of a house in Belgrave Square in direct succession from a house in Clifton Terrace, Ranelagh. The amendment made was to transfer portion of the statement of this qualification from one column of the claim to another. I doubt if this amendment was necessary ; but even if it were, it was within the jurisdiction of the Revising Barrister to make it, as it introduces no new qualification.

Solicitor for the appellant: *W. V. Seddall.*
Solicitor for the respondent: *John McDowell.*

R. D. M.

KELLY *v.* DOYLE AND ANOTHER (1).

K. B. Div.
1906.
Dec. 10, 12, 13, 17.
Appeal.
1907.
Feb. 4, 7.

(1906. No. 3839.)

Sale of leasehold premises—Descriptive particulars—Promise of extended term—Repudiation by lessor—Knowledge of vendor before completion—Fraudulent suppression of material fact—Evidence proper to be submitted to a jury.

Upon the sale of a licensed publichouse, held for the residue of a term of years, of which twenty-five years were unexpired, at a yearly rent of £40, the descriptive particulars stated that a resolution was passed by a board of guardians, who were the landlords, for the grant of a lease for 500 years to the vendor, at a rent of £50 a year, subject to certain conditions as to building. After the purchase the purchaser discovered, for the first time, that prior to completion the guardians had repudiated the resolution, and had recommended the Local Government Board to refuse their sanction to the lease.

In an action for damages for fraudulent suppression by the vendor of the repudiation, evidence was given—contradicted, however, by the vendor—that the vendor was at the board's place of meeting the day when the resolution granting the new lease was repudiated ; that his solicitor afterwards applied to the board for a copy of the original resolution, and to return draft agreements, and was refused ; and that the vendor offered the purchaser £100 for his bargain :—

(1) Before LORD O'BRIEN, L.C.J., and JOHNSON, J.

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Held, by the King's Bench Division and by the Court of Appeal, that this was evidence of fraud on the part of the vendor proper to be submitted to the jury; and that, upon their disagreement, the vendor was not entitled to have a verdict and judgment entered for him.

MOTIONS on behalf of the defendants that the verdict and judgment be entered for them on the grounds that the judge at the trial should have so directed, and that there was no evidence proper to be left to the jury in support of the plaintiff's allegation of fraud and misrepresentation against the said defendants, and that there was no evidence that a resolution of the Board of Guardians, South Dublin Union Finance Committee, passed on the 12th December, 1904, and the confirmation thereof on the 14th December, 1904, was ever brought to the knowledge of them, or either of them, and that there was no evidence that a resolution of the said guardians, dated the 24th August, 1904, was not in full force and validity.

The action was brought to recover damages for fraudulent misrepresentation on the sale of licensed premises, known as the Half-way House, at Ashtown, county of Dublin.

By a written contract, dated the 17th December, 1904, the defendant Doyle agreed to sell to the plaintiff the said licensed premises, as described in the particulars and subject to the conditions of sale annexed to the contract, at the price of £2300, with £115 auctioneer's fees, the defendant Henry being the solicitor having carriage of the sale. In the particulars the premises were described as held under a lease dated the 6th September, 1831, for ninety-nine years from the 1st March, 1830, at the rent of £44. The particulars stated that "the Guardians of the South Dublin Union, who are the landlords, have passed a resolution, dated the 24th August, 1904, to grant the vendor a lease for 500 years at £50 per annum on erecting certain buildings at a cost of not less than £1400."

The 6th condition of sale was as follows:—"A copy of the said resolution furnished by the Clerk of the South Dublin Union shall be conclusive evidence of the existence, contents, and validity of the said resolution. The purchaser shall accept such title to a new lease as the vendor may have thereunder, and shall make no objection to the form or contents of said resolution."

The 10th condition stated:—"The vendor (Mr. M. J. Doyle) recently purchased these premises, with the license attached thereto . . . in the Court of the Lord Chancellor. On the vendor's application for a transfer of the license, the same was refused on the ground of the vendor having other licensed premises (at Knockmaroon), and the vendor is at present carrying on business in these premises under the permission of the Lord Lieutenant. Notice of application for a transfer and new license has been served for next sessions, and it is hoped same will be granted subject to an undertaking to sell. If said application be not granted, the sale shall (unless the purchaser elects to complete same) be rescinded . . . If said application is granted, the purchaser must obtain a transfer to himself at his own expense, and the completion of the purchase shall not be thereby delayed."

A provisional assignment of the premises from Doyle to the plaintiff was executed on the 7th January, 1905, but on the 9th January, 1905, the Quarter Sessions refused the application for a new license and, therefore, the assignment was cancelled.

A new contract was then entered into, partly verbal and partly by letters. As alleged in the 8th paragraph of the statement of claim, the effect of this was that the plaintiff should take an assignment of the premises on the terms contained in the original contract of sale and conditions, and should apply for a license in his own name, the vendor Doyle allowing £1900 of the purchase-money to remain out on mortgage; and the whole transaction was conditional on the license being granted to the plaintiff.

This was followed by an assignment of the premises from Doyle to the plaintiff, dated the 25th February, 1905. There was some controversy between the solicitors (referred to in the judgment of the Lord Chief Justice, *infra*, pp. 365–6) as to reciting and otherwise referring to the resolutions of August, 1904, in the assignment. The solicitor for Mr. Doyle ultimately yielded to the plaintiff's requisitions in this respect. The plaintiff obtained a license, and, on the 25th March, 1905, mortgaged the premises to the defendant Doyle for £1900 and paid him £400, the balance of the purchase-money, and also the auction fees, amounting to £115.

The plaintiff subsequently discovered that the fact was that before the making of the original contract the guardians had

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repudiated the resolution of the 24th August, 1904, and refused to grant a new lease of the premises to Doyle, and had requested the Local Government Board to refuse their assent to such new lease. The statement of claim (paragraph 14) alleged that the defendants, respectively, had full knowledge of these facts prior to the contract, but fraudulently suppressed same from the plaintiff, who was ignorant thereof, and allowed him to believe that the said resolution was in full force, and that the guardians were still willing to give effect thereto and to recommend the granting of such lease and to do all in their power to grant same. This was denied by the defence, and the substantial question in the case was whether there was evidence to go to the jury of such knowledge by the defendants or either of them coupled with its fraudulent suppression from the plaintiff.

The trial took place before Mr. Justice Gibson and a special jury on November 12th and 13th, 1906, when several witnesses were examined on behalf of the plaintiff. The plaintiff himself deposed to the transactions already stated resulting in the assignment of 25th February, 1905, the mortgage of 25th March, 1905, and the payment of the £400 and £115. He swore that he acted on the faith that the resolution of August was in full force, and that he would not have continued the negotiations otherwise. He first heard from his solicitor, Mr. Crowley, in November, 1905, that the resolution was not to be acted on. Witness said, on cross-examination, "that he was not from February to November trying to get better terms from the guardians; he made no effort to act on the resolution, but never said that he would not go on under the resolution, as he expected to get better terms. Doyle offered to take the place back for £2000. The place is fairly profitable." To Mr. Justice Gibson—"I would not have given back the place for £2300; but would have taken £2400." Re-examined—"Doyle said, If you are sorry for your bargain, I'll give you £2000." In reply to a juror witness said that when he applied for the license he thought he was to get the extended term.

Mr. B. Cole, a guardian of the South Dublin Union, proved that he was present at a meeting of the Guardians on December 12th, 1904. He could not say whether he met the defendant Doyle on that day or Wednesday the 14th. Some one introduced Doyle

to witness, who was previously unacquainted with him. The introducer said, "This is Mr. Doyle, our tenant, of Pelletstown."

Mr. Keogh, auctioneer and valuer, deposed that the premises, with the benefit of the August resolution, would be worth £2200; without it only £1400.

Mr. Condon, clerk of the South Dublin Union, produced the minutes of the resolution of 22nd August, 1904, which was to the effect stated in the particulars of sale (1); also of a resolution of the Finance Committee, dated Monday, 12th December, 1904, passed by a majority of one:—

"That, having fully considered the letter received from Mr. Fitzgerald, solicitor (2), in reference to proposed new lease of Mr. Doyle's holding at Pelletstown, we request the Local Government Board not to sanction the proposed lease for 500 years, as an advertisement is appearing in the public Press for the sale of the said premises; and that this Board proceed no further in this matter at present."

This resolution was confirmed by the Board on Wednesday, 14th December, 1904.

The following letters were, amongst others, given in evidence:

"HALF-WAY HOUSE, ASHTOWN, PHŒNIX PARK,
"*8th November*, 1904.

"*To* Chairman, Finance Committee.

"SIR,"—[After referring to newspaper comments on the resolutions of August, 1904, and stating that his case differed from that of another proposed letting:] "Should I not challenge this assertion" [*i.e.* an adverse statement in a newspaper] "and repudiate it as untruthful, the public would certainly come to the conclusion that your committee sacrificed the ratepayers' property in order to do me a special favour.—Yours faithfully,

"M. J. DOYLE."

(1) It appeared by the minutes that this resolution was passed by a majority after three amendments had been proposed and rejected. Doyle signed an undertaking to carry out its terms. The resolution of the committee was, on the 24th August, 1904, confirmed by the Board of Guardians. Some newspaper observations then followed, referred to in the judgments of Johnson, J., and Walker, C.

(2) Solicitor for the guardians. There was a minute of 28th November, 1904:—"Letter from A. Henry, enclosing draft lease and surrender for approval. Refer to Mr. Fitzgerald, solicitor."

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"No. 67,666—1904.
"Sth. Dublin Union.

"HALF-WAY HOUSE, ASHTOWN, PHŒNIX PARK,
"*18th November*, 1904.

"*To* The Secretary, Local Government Board,
"Custom House.

"SIR,—Relative to the resolution of the Board of Guardians, South Dublin Union, of the 24th August last, in connexion with my house, I have not your reply through the Guardians.

"Please inform me early, as the house is in a dilapidated state of repair, if your Board has sanctioned the resolution granting the lease.

"Yours faithfully,
"M. J. DOYLE."

[REPLY.]

"No. 67,666—1904.
"Sth. Dublin Union.

"LOCAL GOVERNMENT BOARD, DUBLIN,
"*22nd November*, 1904.

"SIR,—I am directed by the Local Government Board for Ireland to acknowledge the receipt of your communication of the 18th instant, relative to the lease which the Board of Guardians of South Dublin Union propose to grant you of the premises known as the Half-Way House, Ashtown, and I am to inform you that the draft lease has not yet been submitted to the Local Government Board by the Guardians.

"I am, Sir, your obedient servant,
"A. R. BORLASE,
"*Asst.-Secretary.*

"MR. M. J. DOYLE,
"Half-Way House, Ashtown, Phœnix Park."

There was also proved a minute of the Guardians of 7th January, 1905:—"Letter from A. Henry *re* Half-Way House, Pelletstown, requesting to be furnished with copy of the Board's resolution *re* new lease for above; also draft agreements which he forwarded approved. Information refused."

This was communicated by Mr. Condon to the defendant Henry, in a letter dated 14th January, 1905.

The defendants' counsel asked for a direction, which was refused. They then proposed calling no witnesses; whereupon his Lordship gave liberty to the plaintiff's counsel to examine the

defendants, notwithstanding the objection of defendants' counsel at that stage.

Doyle, being examined, denied that he was at St. James's Street (the place where the board met) on either the 12th or 14th December, or that he ever met Cole there. He had no recollection of Condon's letters. Henry did not read for him the letter of the 14th January. Asked if he would contradict Mr. Henry's answer to an interrogatory, in which Henry stated he read the letter to Doyle, Doyle said, "I can't say; I am not positive." Cross-examined by his own counsel, he said he first heard of the December resolution after the commencement of the action. He offered plaintiff £2400.

The defendant, Henry, was also called by the plaintiff, and proved the letter referred to in the minute of the 7th January, 1905. This was asking for a copy of the August resolution.

The defendants gave no evidence, but their counsel again asked for a direction, which was again refused.

His Lordship, in his charge, discriminated between the effect of the evidence as to the respective defendants, and left to the jury the following questions:—

1st. Were the resolutions of 12th and 14th December, 1904, material to be known to a purchaser?

2nd. Did both the defendants, or one, or which of them, know of the said resolutions, or one, and which of them—(*a*) before the auction? (*b*) or before the 7th January, 1905? (*c*) or before the 6th February, 1905? (*d*) Was the letter of January 14th understood as meaning that the resolution of August was not in force? Was it so understood—(*a*) by Henry? (*b*) by Doyle?

3rd. If yes, did the defendants, or one, and which of them, suppress the existence of such resolutions or resolution?

4th. If yes, was such suppression intentional and in order to deceive and mislead?

5th. Was the plaintiff induced by such suppression—(*a*) to purchase? (*b*) to execute the deeds of conveyance and mortgage?

6th. Was the operative continuance of the resolution of August—(*a*) part of the contract carried out by such deeds? (*b*) was there a continuing representation that such resolution was in full force?

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7th. To what damages, if any, is plaintiff entitled?

The jury answered "yes" to the first question, but could not agree as to the others, and were discharged without a verdict.

After the discharge of the jury, the defendants' counsel again applied for a direction, which his Lordship again declined to give, pointing out that they could apply to the Divisional Court.

Serjeant Dodd and *Gordon, K.C.* (with them *Jefferson, K.C.*), for the defendant Doyle.

The Right Hon. J. H. Campbell, K.C., and *Henry, K.C.* (with them *Donaldson*), for the defendant Henry.

The Solicitor-General (*Redmond J. Barry, K.C.*) and *Carrigan* (with them *Moriarty, K.C.*, and *Powell, K.C.*), for the plaintiff.

Dec. 17.

LORD O'BRIEN, L.C.J.:—

This case has been very ably argued, and we now proceed to give judgment. I desire to state in the forefront of my judgment what the precise question before us is. It is imperatively necessary in justice to Mr. Doyle to do so. The question is whether there was evidence of fraud proper to be submitted to the jury—not whether the defendants were actually guilty of fraud but whether there was evidence of the fraud alleged proper to be submitted to the jury. I am anxious to make this clear, because the casual or perfunctory reader might perhaps think, or the malignant say, that the Court held fraud was established. It is also essentially necessary to be extremely careful lest anything we do say might prejudice another trial of the case. Premising so much, what is the alleged cause of action, and what are the facts?

The alleged cause of action is shortly this—that, in the sale of certain premises to the plaintiff, the defendant Doyle and his solicitor, Henry, fraudulently suppressed the repudiation of a certain resolution of the Guardians of the South Dublin Union and thereby induced the plaintiff to give more for the premises than he would otherwise have given. This is the alleged cause of action. What are the facts? The defendant Doyle, who was the owner of one publichouse, had acquired another, namely, the

Half-Way House at Ashtown, county Dublin, which was held under lease for a term of ninety-nine years, from the 1st March, 1830, at the yearly rent of £44. Being desirous of getting an extension of this lease, he applied to the lessors, the Guardians of the South Dublin Union. After some correspondence the defendant Doyle got the Finance Committee of the Guardians to pass, on the 22nd August, 1904, a resolution in the following words:—"That we grant Mr. Doyle, of Pelletstown, a lease for 500 years at £50 per annum, on his putting up a building on the site of the present house and premises, at a cost of not less than £1,400. The said lease to be executed on the completion of such building. Mr. Doyle to surrender to the Guardians the existing lease." This is the resolution, and it must not be lost sight of that that resolution was signed by the defendant Doyle. This resolution was afterwards—namely, on the 24th August—ratified by the general body of the Guardians. From the beginning to the end of this case it will appear that throughout Mr. Doyle took the greatest interest in, and naturally attached much importance to, that resolution. He was present on the occasion of the Finance Committee passing the resolution, and apparently watched its existence with much anxiety. Very naturally so. The term of the original lease was only for ninety-nine years from the 1st March, 1830. This, on the fulfilment of the condition as to building, was to be for 500 years. The existence of this resolution greatly enhanced the value of the Half-Way House premises. Kelly, the plaintiff, swore that the premises were practically worthless without this extending provision, and Mr. Keogh, a well-known respectable auctioneer, swore that with the benefit of the resolution the premises were worth £2,200, without it only £1,400. Of course if this resolution had been repudiated, justice imperatively demanded that its repudiation should be made known. No intending purchaser should have been allowed to remain under the impression that it still remained in force. The question is, whether there is evidence that the defendants Doyle and Henry knew it had been repudiated. However, I pass on. Doyle had some difficulty as to getting a license, and he proposed to sell the premises. He put them up for auction. It is very important to see what the particulars and conditions of

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sale were. It is of vital importance in relation to both defendants—I might say especially so in relation to Mr. Henry, having regard to the distinctive ruling we make as to him, granting his motion, but directing him to abide his own costs, not alone of the argument but of the trial. Mr. Doyle's case and Mr. Henry's must be kept separate, but it is convenient to deal with the entire case in chronological order. Towards the close of my judgment I shall summarize the main factors which have induced me to think there is evidence of fraud against Mr. Doyle, and as regards Henry that he should be directed to abide his own costs.

With reference, then, to the particulars and conditions, he who runs may read. It was as plain as light that the resolution of the 24th August was represented to be still in force, without any question as to its validity or operative continuance; that the purchaser was to get the benefit of that resolution. This was the basis upon which the contract was made. Let me refer in detail to the particulars and conditions of sale.

The particulars are as follows:—"All that and those the house and premises known as the Half-Way House, Pelletstown, Ashtown, county Dublin, with field attached, containing in all 3 acres, or thereabouts, held under lease dated 6th September, 1831, for the residue, now unexpired, of a term of ninety-nine years, from the 1st day of March, 1830, at the yearly rent of £44, payable quarterly. The Guardians of South Dublin Union, who are the landlords, have passed a resolution, dated 24th August, 1904, to grant the vendor a lease for 500 years, at £50 per annum, on the fulfilment of certain terms as to building. A copy of the lease and of the said resolution will be produced at the sale, and may be inspected at the office of the vendor's solicitor."

It could not be more plainly stated that the resolution was then in its unimpaired integrity, such as it was on the day it was passed, with no impeachment of it, and with no question raised or any suggestion made that it was, or could be, impeached or questioned. It was provided that the resolution as well as the lease would be produced at the sale, and could be inspected at the office of the vendor's solicitor. The lease and resolution were always placed in juxtaposition—naturally so, on account of the enhanced value of the lease by reason of the resolution.

So much for the particulars. I now come to the conditions of sale, and I turn to the 6th condition, which is as follows:—"A copy of the said resolution, furnished by the Clerk of the South Dublin Union, shall be conclusive evidence of the existence, contents, and validity of the said resolution. The purchaser shall accept such title to a new lease as the vendor may have thereunder, and shall make no objection to the form or contents of said resolution."

This 6th condition does what it says—it provides as to what should be conclusive evidence of the existence and validity of such resolution: I note the two words, *existence* and *validity*—and provides further that the purchaser shall *accept such new title to a new lease* as the vendor may have thereunder, and shall make no objection to the form or contents of the said resolution. Is it not strange, indeed, that with all this precision, and the importance attached to the resolution of the 24th August, all reference to it should be struck out of the draft assignment of the premises by Mr. Henry? It is said to be the practice of conveyancers. Notwithstanding this pretension to conveyancing lore, I do not think it is the practice of conveyancers to ignore what I might, perhaps, describe as something approaching to the part of Hamlet. The assignment would be, so far as the purchaser was concerned, the principal title-deed of the purchaser; and if, some time after the purchaser had bought, he resolved to sell, there would be no reference at all to one of the very material subject-matters of purchase, namely, the benefit of the resolution of the 24th August. I think an intending purchaser would be much exercised by this. So apparently wrong was the striking out of all reference, both in recital and habendum, to the resolution of the 24th August, that it was instantaneously reinstated by Messrs. Crowley & Bolger, and the reinstatement was immediately, without demur, accepted by Mr. Henry. The Solicitor-General contended that, to use his language, the "immediate handing in of his gun" by Mr. Henry looked like some awkward consciousness. Most certainly, in my opinion, the reason assigned in the margin of the draft assignment for striking out both in recital and habendum all reference to the resolution of the 24th August is wholly unsatisfactory. The marginal note was, that the conditions of sale did not provide for sale of vendor's interest

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in a new lease from the Guardians. This, to say the least of it, was somewhat curious, having regard to No. 6 of the conditions—that the purchaser shall accept *such title to a new lease as the vendor may have under the resolution*, and shall make no objection to the form or contents of such resolution. Mr. Gordon, who really omitted nothing in his exhaustive argument, intimated that Mr. Henry and his clerk were such hard-bitten common lawyers that they contented themselves with conveying the legal interest under the original lease. Indeed, it was contended that the technique of the thing required an elimination of all reference to the resolution, the importance of which both particulars and conditions made so manifest. This was, indeed, a large sacrifice to technique. All right or equity founded on the resolution of August, which loomed so largely in particulars and conditions, and which was signed by Mr. Doyle himself, was left to take care of itself. The question remains, why was all reference to the main incentive to purchase so prominently referred to in the particulars and conditions—why was all reference to the resolution, on the faith of the existence and validity of which the plaintiff purchased, struck out of the draft assignment. It was said, with a certain amount of *naïveté* that Mr. Henry left this matter to his clerk. This is precisely what he should not have done. All alterations should have been read by himself. The full consideration Kelly was to give was stated. Why not state fully the consideration he was to receive?

But I pass on. It appears that the resolution of the 24th August attracted attention in the public Press. The letter of the 8th November, from the defendant Doyle to the Chairman of the Poor Law Guardians, shows how anxious he was about the matter. He plainly feared that its propriety would be challenged. His apparent apprehensions were, indeed, well founded.

I now come to the important occasion, to the 12th or 14th of December, when the repudiation, the practical rescission, of the resolution of the 24th August took place. Was Doyle at the Union at St. James's Street on either of these days? Was there evidence that he was? A jury might well think there was not only evidence that he was there, but that the evidence of his presence there was absolutely conclusive. Mr. Cole, who had not the slightest motive for misrepresentation, swore that he was intro-

duced to him by some one who said, "This is our tenant from Pelletstown." Was this a figment of Cole's imagination? Did he invent the expression, "This is our tenant from Pelletstown"? Now, then, mark the occasion, mark the words. The occasion was the discussion as to the repudiation by the Finance Committee or by the Guardians of the resolution of the 24th August. Mark the words of introduction—"This is *our* tenant from Pelletstown." Note the word *our*—our tenant. The Guardians were the landlords: therefore, the person who introduced must have been a Guardian. Why not say Mr. Doyle only—why use the expression—"Our tenant at Pelletstown"? Was he to be identified as a person interested in relation to the matter in hand—viz., the repudiation of the resolution of the 24th August? And to whom was he introduced? To Mr. Cole, who was about to move, or had moved, the resolution of repudiation. What brought Doyle there—what brought him there at the psychological moment? Is it not plain that he went there on the 12th or 14th because he knew that the resolution of the 24th August was to be discussed, and that it was to be discussed in a hostile manner? It had been passed originally by the Finance Committee and the Board; and if it was to be canvassed at all, he must have known well that it was to be canvassed in a hostile sense.

This is also apparent from the letter of the 8th November—an all important letter. It is no speculative matter. It is, so to speak, an external fact. The contents of that letter could be heard by the ears and seen by the eyes of the jury. It discloses the hostile opinion which existed with reference to the resolution of the 24th August, and indicates Doyle's very keen apprehension as to what might be done in deference to the opinion which existed. As to the allegation that Doyle, being, forsooth, solicitous for the good name of the Guardians, wrote the letter of the 8th November, I think this allegation requires no elaborate treatment. A jury might well think that it was concern for his own interests prompted the writing of that letter to the Chairman of the Finance Committee, and that altruism was not Mr. Doyle's predominant characteristic. The letter was written to be brought by him before the Board at the first formal meeting when the crisis came on as regards the publichouse premises at Pelletstown. If the letter was not to be

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formally read—perhaps it was not; that course might be somewhat crude—a jury might well believe it was intended by Doyle, whatever his professions were, to supply arguments in favour of his threatened interests, and that, when he went subsequently to St. James's Street, he was not precisely "fancy free." A jury might well believe that it was an intense anxiety about the resolution of the 24th August, which he knew well was imperilled, that brought the writer of the letter of the 8th November—namely, "our tenant at Pelletstown"—to St. James's Street at the psychological moment.

Is it to be said that twelve men of the world, familiar with the affairs and conversant with the ways of men, could not reasonably draw the inference that Doyle was there because he knew that the resolution of the 24th August was being discussed, and was in great jeopardy? There was nothing requisite to confirm it, because, as I have said, it had been passed originally, both by the Finance Committee and the Guardians, and if it came under discussion at all, it did so, not for confirmation, but for repudiation. Is it to be said that twelve men, under all the circumstances, could not reasonably draw the inference, could not reasonably infer, that Doyle was there because he knew that the resolution of the 24th August was at least in great peril? I use the words *reasonably* infer, emphasizing the word *reasonably*, for this is the test laid down by Lord Tenterden in his well-known judgment in *Sir Francis Burdett's Case* (1). Most fully granting that the onus of proof lies on the plaintiff, and that surmise, conjecture, or suspicion will not suffice, could not twelve men reasonably infer that he was there on the 12th or 14th because he knew the resolution of the 24th August was in a precarious, a moribund, condition? Doyle was, if I may use a simile, outside the door of the room in which the patient was dying. Did he go there because he believed him to be in good health, or because he knew that he was in a precarious or moribund condition? To suggest that the "tenant of Pelletstown" was there that day for some purpose of general philanthropy would certainly provoke a smile from that embodiment of good sense, the man in the street; and

(1) 4 B. & Ald. 161.

after all I do hope that our law is not such as to excite the derision of the average citizen.

Well, pausing here, and not going any further for the moment, dealing with Doyle alone, I think there was evidence to go to the jury as against Doyle. There was not a whisper from Doyle, or the smallest hint from the conditions of sale, that the resolution of the 24th August had been repudiated, or was in great peril. It was represented as a resolution, to use the language of my brother Gibson, of operative, unchallenged, and unchallengeable, continuance; and upon this representation the plaintiff was induced to bid. Now, I put this question to counsel more than once—Suppose, I said, that Doyle knew, that the extent of Doyle's knowledge was, that the resolution of the 24th August had been challenged by a body competent to challenge it, would Doyle be justified in allowing the reference to the resolution in the particulars and conditions of sale to remain as it was. Mr. Gordon, who argued the case so admirably on behalf of Mr. Doyle, gave more than once the answer that he ought to have given—namely, that Doyle would not be justified in allowing the reference to the resolution to remain as it was; but, he added, that there was no evidence that Doyle knew that the resolution was challenged, or likely to be challenged or challengeable, and he also contended that that was not the character of the fraud charged—that what was charged was knowledge of actual repudiation.

As to the first point, I think, for the reasons I have assigned, there was evidence that Doyle knew that the resolution of the 24th of August was seriously challenged, that it was in a very precarious condition, if not dead. This was the low-water mark of his knowledge. As to the second point—that there was no evidence of knowledge of actual repudiation of the resolution of the 24th of August, and that in the case of fraud the fraud alleged must be established—it is to be remembered that Doyle's case was from the beginning that his mind was a virgin page as to any impeachment of the resolution of the 24th of August—that he never heard of the December resolutions until the action was commenced—that is, as it were, his mind was clean throughout. This was the case he came to make and prove. Of course if Doyle knew that the resolution was in grave peril, his moral guilt in suppressing that,

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and leading the plaintiff to believe that there was no question at all about the resolution, was just the same as if, having known of actual repudiation, he suppressed the fact of his knowledge of actual repudiation. It is, I think, manifest that the plaintiff Kelly, who was absolutely blameless throughout, would not have purchased if he knew that the resolution of the 24th of August was challenged; certainly that he would not have given nearly as much as he did for the premises. He swore that without the resolution the premises were practically useless. Keogh swore that the repudiation of the resolution made a difference in price to the extent of £800. Now, if there was any defect in the pleading—and I am not to be taken as saying there was any substantial defect—if there was evidence, as I think there was, that Doyle knew that the resolution was in grave peril, I would most unhesitatingly have amended the pleadings so as to meet the actual case. Lord Esher said that he would not alone amend pleadings so as to make them correspond to the facts, but that he would consider the pleadings as having been amended with that object. It is to be remembered that the amendment contemplated, if it was at all necessary, would not raise what would be really a distinct head, a really different kind, of fraud. What was charged in substance here was falsely representing the resolution as one of operative and unchallenged continuance.

It will be perceived that I have dealt with the case of Doyle without any reference whatever as to his alleged false swearing as to his presence on the 12th or 14th December at what was called St. James's Street. This expression, "St. James's Street," was at one time in the course of the argument incidentally, parenthetically, referred to as meaning "any place in St. James's Street"; some place other than the Union premises; as if, forsooth, the defendant Doyle was vaguely, in vagrant mood, wandering about St. James's Street on either of the days in question. The parenthetical suggestion a jury might well think was of a forlorn character. A jury of his fellow-citizens might well regard Mr. Doyle as a man of set purpose rather than of listless mood. It will be perceived also that I have dealt with the case wholly irrespective of Doyle's swearing that he did not know of the letter from Condon of the 7th January, and Henry's contradiction of

that swearing. I have dealt with it also, as may be perceived, without reference to the fact that Doyle swore he offered £2,400 for the premises—a sum which was said to be very considerable, indeed, if his conscience was absolutely clear. I have dealt with it also irrespective of the fact that Doyle or Mr. Henry gave no explanation of what took place at Mr. Henry's office on the 13th of December—a very singular omission, indeed, if Doyle or Henry desired a full vindication from a serious charge of moral fraud. The Solicitor-General offered more than once, indeed I might say on several occasions, to allow Mr. Henry's books to be given in evidence; but the defendants' counsel were within their strict right in saying they were not produced at the trial, and they would not produce them now; not, indeed, that I would myself attach much importance to the fact, if fact it were, that the books were found a blank as to the day in question.

But now I come to the question whether there was evidence that Doyle knew that the resolution of the 24th of August was repudiated. I am clearly of opinion that there was evidence that he knew of its repudiation. Why did Doyle offer Kelly for his bargain £2400? The sale at the auction had been put off because only £2100 was bid at the auction. Kelly bought subsequently for £2300, and Doyle offered him for the bargain £2400. The one point that Serjeant Dodd pressed with great earnestness was this offer by Doyle of £2400; in fact it came out on a question put to Doyle by his own counsel, or he volunteered it. Was it a mere Court offer to influence the jury, or was it an offer of so much money down? Kelly stated that he had not offered so much, but as against Doyle, I must assume he made the offer of £2400. He swore that he did. Why then offer Kelly a bonus of £100 for his bargain, the more especially as Doyle could not himself get a license for the premises? Why give any sum at all? Why give Kelly £50 or £20 or any sum at all, when a charge of fraud was made against him, Doyle. So doing, was in my opinion evidence as an admission of liability as to the whole case made in the pleadings against Doyle, and the offer of this bonus for Kelly's bargain was just the one thing that a jury would pay much heed to. Feeling the significance of this offer, counsel for the defendant Doyle cited the case of

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Powell v. *M'Glyn* (1). That case had not, having regard to the parties, the character of the offer, and the circumstances under which the offer was made, even a remote analogy to the present. In giving judgment in that case, I said (p. 179) that to regard the offer that was made, in the circumstances under which it was made, as evidence of liability, would be to stay the hand of charity. Here, if I may use the expression, were two hard-headed, unemotional grocers dealing at arm's length.

Now I come to another point. Doyle had sworn that he was not present at St. James's Street on either the 12th or 14th December. If this was, as a jury might think, palpably false, might not the same jury put the question to each other in the jury-room—Why did Doyle crudely lie? I need not state that I am dealing with the case hypothetically. I wish to guard myself against even the appearance of making categorically a charge of fraud against Mr. Doyle. But to continue, that great lawyer, Mr. Justice Willes, said in his judgment in the case of *Morphett* v. *Morphett* (2) (a case in which no doubt the judges differed as to the character and effect of the general facts of the case), that a man "who, having the opportunity of explanation, offers none beyond a flat contradiction, exposes himself, when the fact is established by competent proof, to the inference that his lying denial was the result of conscious wrong. *Whether that inference be a just one under the circumstances is a question for a jury.*" This is the statement of Mr. Justice Willes. Mark the word "inference," and mark the words "conscious wrong." In using the word "inference," he is not dealing merely with the neutralisation of evidence, with merely the striking out of evidence, but with a fact to be inferred from antecedent facts, and what "consciousness of wrong" could there be in this case—let each herring hang by its own tail—except that arising from the fact that Doyle knew the facts connected with the resolution of the 24th August, and suppressed them. We are not bound by the decisions of the Divisional Courts in England. They do not consider themselves bound by our decisions. If there was a difference of opinion on the precise point between Mr. Justice

(1) [1902] 2 I. R. 154; 187. (2) L. R. 1 P. & M. 708.

Willes and the other two Judges who constituted the Court, I would most certainly adopt the opinion of Mr. Justice Willes, more especially if it coincided with my own. Mr. Justice Willes, we all know, was, perhaps, the greatest Common Law lawyer of modern times. He delivered the unanimous judgments of the Exchequer Chamber more frequently than any Judge of his time. In this case, his opinion as to what inference may be drawn from false swearing (indeed he dealt only with non-explanation) must have been the stronger and clearer, inasmuch as he appeared to differ from the two other Judges who, with him, constituted the Court on the occasion. Dissent connotes strong conviction. If an inference can be drawn from non-explanation, I would say it can be drawn *a fortiori* from false statements.

The "fact" here was that Doyle was at St. James's Street on either the 12th or 14th December, and the "competent proof" is the evidence of Mr. Cole that he was there on either of these days. It is to be remembered that Lord Penzance and Mr. Baron Cleasby did not deny in their judgments in *Morphett* v. *Morphett* (1) that under no circumstances could an inference of "consciousness of wrong" be drawn from false swearing. They merely stated that the circumstances of the particular case did not warrant the drawing of such an inference. Mr. Justice Willes went to a considerable length in the particular case, because a man might be infected with the loathsome disease referred to without knowing he was so infected. Again, there is the statement by Doyle that Henry had not told him of Condon's letter of the 14th of January. Having regard to Henry's contradiction of this, the jury might well infer that in this respect also Doyle told an untruth; that, in fact, he had made up his mind falsely to deny everything which tended to establish the charge made against him. Furthermore, it is very extraordinary that Doyle did not tell Henry what took place at St. James's Street (I assume for the purposes of the argument he did not) on the 12th or 14th of December. If he knew it—and, I think, there was evidence he did—was it to make Henry the innocent agent of his fraud?

(1) L. R. 1 P. & M. 702.

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Well, indeed, might my brother Gibson state that there was a great economy of interrogation. Neither Doyle nor Henry gave any information as to what took place upon the 13th of December at the office of the latter, though it was in proof that Doyle was there on that day. It was said, using the language of the race-course, that it was then, or later, that Henry, or his clerk, got the "tip"—a colloquial but not ineffective expression. However, I draw no legal inference against them from their "economy" in this respect. There was the usual battle as to upon whom the onus lay to interrogate as to this matter. It was said, forsooth, that Doyle and Henry, who were charged with fraud by the plaintiff, were his witnesses. No doubt, at the suggestion of the Judge, the Solicitor-General called them. This question of onus comes very incongruously from defendants who profess to be very earnest for a moral vindication against a charge of fraud. Even before the Judge intervened it had been determined not to call the defendants as witnesses, though there was, in my opinion, clear evidence against Doyle at least. However, let this be. I have referred to it lest it should be said I made it a factor in the conclusions at which I have arrived. I desire to discriminate between what I consider evidence and what I do not.

Lastly, there was addressed to us this interrogatory: Would what was adduced here as evidence be evidence in a criminal case? The question is very familiar. It is, however, somewhat vague, because the "criminal case" is not precisely defined. But I answer unhesitatingly that if the charge here was a criminal as well as a civil charge, what is offered would be admissible as evidence to establish guilt. What affords reasonable evidence of a certain conclusion, though a jury in a criminal case may not act upon it, cannot be cut down to *mere* suspicion, conjecture, or surmise, because the liberty of the subject may be involved. This interrogatory as to what constitutes evidence in criminal cases has often, I fear, been a bugbear to judicial tribunals, and under the alarm created by it grave civil wrong has often remained unredressed. No doubt we should move very carefully and very cautiously in relation to the criminal law; but we should not allow reasonable circumspection to degenerate into mere misleading apprehensions. Of course, anyone who has any experience of the

criminal law and the action of juries knows there is a marked difference between the *effect* of evidence in civil and criminal proceedings.

Dealing with this point, the "effect" of evidence, in *Cooper* v. *Slade* (1), Mr. Justice Willes, after referring to an earlier edition of Mr. Best's work on evidence, which he styled able and instructive, said that he begged to be excused for referring to an authority in support of an elementary proposition "that in *civil* cases the preponderance of probability may constitute sufficient ground for a verdict. . . . So long ago as the 14 Elizabeth, Chief Justice Dyer and a majority of the Judges of the Common Pleas laid down . . . 'where the matter is so far gone that the parties are at issue, or that the inquest is awarded by default, so that the jury is to give a verdict one way or the other, there if the matter is doubtful, they may found their verdict upon that which appears the most probable, and by the same reason that which is most probable shall be good evidence.'"

I must fulfil my promise to summarise. Taking, then, as against Doyle the particulars and conditions of sale—the letter of the 8th November—the fact that if the resolution of the 24th August was to be canvassed at all it was to be canvassed in a hostile sense—the resolutions of the 12th and 14th December—the evidence of Doyle's presence at St James's Street under the circumstances of the occasion, his offer of £2400, his denial that he was at St. James's Street, and his denial as to having heard of Condon's letter of the 14th January, I am satisfied that there was evidence proper to be submitted to the jury against Doyle of the fraud alleged in the pleadings, and that no amendment is necessary. Therefore, I think, as regards Doyle, his motion should be refused with costs.

After much consideration I am not satisfied there is evidence of fraud against Henry, and I am accordingly of opinion that his motion should be granted, but without the costs of the motion, and that he should be directed to abide his own costs of the trial, having regard to all the circumstances of the case connected with him—to his action with reference to the draft assignment; to his action with reference to Condon's letter of the 14th January, 1905,

(1) 6 H. L. Cas. 772.

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peremptory and repellent and suggestive as it was; to his letter of the 15th January, 1906, in reference to Condon's letter known as the "reasons" letter—*lucus a non lucendo*—reasons that were never assigned, though sought for by Messrs. Crowley and Bolger.

We are of opinion that the plaintiff was blameless throughout, and that the defendant Henry, by his own conduct and action, induced the litigation against him. We shall make the appropriate special order. The general result is that Mr. Henry is released from litigation, while Mr. Doyle is left to address himself again to a jury of his fellow-citizens.

JOHNSON, J.:—

The resolution of the 24th August, 1904, to part with the ratepayers' property for 500 years in consideration of a yearly rent of £50, with a rebuilt publichouse thereon costing not less than £1400, was passed by the Guardians without any valuation having been ordered or made to inform them of the value of what they were dealing with. Doyle's case, by his letters to the Guardians of the 9th and 16th August, 1904, was that his license had been opposed on the ground that his house was dilapidated and therefore unsuitable, and that "if his license was refused it would be ruinous to his family." When the action of the Guardians became public, it was sarcastically referred to in the newspapers as "a very handsome present" to Doyle, who immediately wrote (8th November, 1904) to the Chairman of the Finance Committee—"Should I not challenge this assertion and repudiate it as untruthful, the public would certainly come to the conclusion that your committee sacrificed the ratepayers' property in order to do me a special favour." This would appear to have been the case if the real value was as stated in their clerk's letter of the 4th January, 1906, "a fine of £4000, rent £50, term 100, not 500 years." Doyle, therefore, had the strongest interest in getting rid of his "handsome present" instead of retaining and carrying on the business; and he advertised the place for sale by auction on the 16th December, 1904, as the residue of a 99 years' lease at a rent of £44, payable quarterly. The particulars of sale stated that the Guardians, "who are the landlords, have passed a resolution dated 24th August, 1904, to grant the vendor a lease

for 500 years at £50 per annum on the fulfilment of certain terms as to building." A copy of the lease (existing lease) and "of the said resolution will be produced at the sale and may be inspected at the office of the vendor's solicitor," who was the defendant Henry. At that time this was accurate. The 6th condition, which the Lord Chief Justice has read, is that a copy of the resolution "shall be conclusive evidence of the existence and validity of said resolution." But after these particulars and conditions were published, and before the 12th December, 1904, the Guardians had been in communication with Mr. Fitzgerald, solicitor, respecting this "proposed new lease" to Doyle, and his opinion, as shown by the resolution of the Finance Committee of the 12th December, 1904, was not in favour of the course the Guardians had taken. That resolution, seconded by Cole, was—"Having *fully considered* the letter received from Mr. Fitzgerald, solicitor, in regard to proposed new lease to Mr. Doyle's holding at Pelletstown, we request the Local Government Board not to sanction the proposed lease for 500 years, as an advertisement is appearing in the public Press for the sale of said premises, and that this Board proceed no further in the matter at present." An amendment to this resolution, to postpone the matter for a fortnight, was defeated by a majority of one.

The Guardians' boardroom is in St. James's Street. Doyle was not a Guardian. He had no business to bring him there except his proposed lease, and it was stated and admitted at the Bar that he was present there when the original resolution, of the 24th August, 1904, was passed. Though the charge against Doyle in this action is fraud, he was not called by his counsel as witness for himself in his own vindication, and when Mr. Justice Gibson allowed him to be examined, his counsel objected. However, the Solicitor-General, for the plaintiff, called him, and he admitted he knew that the Finance Committee met on Monday, and the Board of Guardians on Wednesday, but positively denied he was there either on Monday, the 12th, or Wednesday, the 14th. He also positively denied that Henry told him of, or read to him, Condon's letter of the 14th January, 1905 (in reply to Henry's letter, asking for a copy of the resolution of 24th August, and his draft agreements), "that the Guardians cannot see their way to accede" to Henry's request; and when

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he was confronted with Henry's answer to an interrogatory on that point and asked, "Will you contradict that?" he said, "I can't say; I am not positive." Henry says Doyle was in his office on the 15th, and that he communicated Condon's letter of the 14th to Doyle that day.

Cole, in his evidence, states as follows: "On Monday, December 12th, I was present at meeting. I knew Mullett, P.L.G. I can't say whether I met Doyle on that day or Wednesday, 14th. I can't say he was with Mullett. Some one introduced me to him. I didn't know him before. Doyle said nothing. The introducer said, 'This is Mr. Doyle, our tenant at Pelletstown.' That was all. I went into the Board."

Doyle's shifting answer, when confronted with Henry's answer to the interrogatory, evidences that his previous positive denials were the result of conscious wrong, and permeates all his evidence, which is unreliable and untrue. He was in St. James's Street on the 12th, and about his own business in which he was so deeply interested to find out how his proposed lease was dealt with, and naturally he would not leave until he had ascertained the result.

The sale of the premises did not take place until the 17th December, under the said particulars and conditions of sale; but neither directly nor indirectly was the plaintiff or his solicitor informed that the Guardians refused to grant a lease until the existing lease expired. Doyle's offer to take back the premises or give plaintiff £2000 or £2400 (which would not cover Kelly's costs) for them when the differences arose, would appear to be more consistent with guilty knowledge of fraud than a *bona fide* offer to settle the dispute.

The delay in instituting this action is accounted for by the delay in obtaining the license, and Crowley & Bolger treating the matter as going on regularly until their suspicions were aroused by Condon's letter of the 24th November, 1905, that the Guardians had a valuation of the premises made by Keogh.

I therefore agree with the Lord Chief Justice, that Doyle's motion should be refused with costs.

As to the other defendant, Henry, the case presents greater difficulty. There is the admitted interview with Doyle at Henry's office on the 13th December, when, as I think, Doyle knew the

result of the Guardians' meeting on the 12th December, and Henry's letter to Crowley & Bolger, which the Lord Chief Justice has referred to as the "certain reasons" letter. There are Henry's erasures from the draft conveyance of all reference to the resolution of the 24th August, 1904, and his letter of the 22nd March, 1906, that he never heard "*previous* to the sale" that the Guardians refused to carry out the resolution of the 24th August, 1904. He had not the strong motives by which Doyle was actuated, and in my opinion there is not that convincing evidence against him which there is against Doyle. I, therefore, agree that his motion should be granted, but without costs.

J. G. T.

The defendant Doyle appealed to the Court of Appeal (1).

Serjeant Dodd, *Gordon, K.C.*, and *Jefferson, K.C.*, for the appellant:—

We contend that no facts were proved at the trial from which an inference of fraud could reasonably be drawn against the appellant; and a verdict should have been entered for him. There was no evidence as to when, where, or by whom the appellant was informed that the resolution granting him a new lease had been challenged, and knowledge of the resolution of 12th December, or of its ratification on the 14th, cannot be imputed to him. On the contrary, the evidence shows that those proceedings were intentionally withheld from the appellant, whose letter of the 8th November was not answered by the Guardians. In order to succeed in this action the plaintiff must prove fraud by clear and satisfactory evidence: "This being a jurisdiction founded on personal fraud, it is incumbent on the Court to see that a fraud, a *malus animus*, is proved by the clearest and most indisputable evidence. It is impossible to supply presumption

(1) In the Court of Appeal, before SIR SAMUEL WALKER, C., PALLES, C.B., and HOLMES, L.J.

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in the place of proof," *per* Lord Westbury, in *M'Cormick* v. *Grogan* (1).

[They also cited *Thomson* v. *Eastwood* (2), *King* v. *Burdett* (3).]

The Solicitor-General (*Redmond Barry, K.C.*), *Powell, K.C.*, and *Carrigan*, for the respondent:—

There was ample evidence from which a jury could infer that the appellant knew before the completion of the sale that the new lease was challenged. The resolution of 12th December was not a unanimous one. There was a party both for and against it, it was only carried by a small majority, and a jury may reasonably draw the inference that some one told the appellant of the result. The appellant had gone to James's Street on the very day of the resolution; it is clear that he was there on the business of the Pelletstown lease; it is not suggested that he had any other business there; and, having regard to Cole's evidence, the jury were entitled to disbelieve the appellant's statement that he was not there at all on that day, and to draw the presumption from the proved facts, that he knew the new lease was in jeopardy: *Morphett* v. *Morphett* (4), *per* Willes, J. The concealment of that fact from the purchaser and the representation on the face of the particulars and conditions of sale that the resolution in favour of the new lease was a valid and unchallenged resolution, amounted to fraud on the part of the appellant, and entitles the respondent to relief in this action. Further, when the appellant had admittedly full knowledge of what had happened, he did nothing, and a jury would be entitled to take that fact into consideration as reflecting light on what had occurred before. Then there was the offer of £2400, proved by Doyle himself: *Wallace* v. *Small* (5).

Serjeant Dodd, in reply.

(1) L. R. 4 H. L. 82, at 97.
(2) 2 A. C. 215.
(3) 4 B. & Ald. 95.
(4) L. R. 1 P. & M. at p. 708.
(5) Moody & Malk. 446.

SIR S. WALKER, C. :—

We have heard this case very fully, and have had an opportunity of considering it during the adjournment. In the result, we are all of opinion that there was evidence which might be submitted to a jury from which they were at liberty to draw inferences—I say pointedly from which they were *at liberty* to draw inferences—and we do not suggest at all what inferences they *ought* to draw.

It appears that prior to August, 1904, this man Doyle was tenant to the Guardians of the South Dublin Union of certain premises, with a license attached, known as the Half-Way House, at Pelletstown, for the residue of the term of a lease of the year 1831, at the rent of £44. These premises had been dilapidated, and in January, 1904, a renewal of the license was refused on the ground of unsuitability of the premises. Doyle applied to the Guardians for an extended lease, he undertaking to expend £1400 on the buildings, stating to the Guardians that if the license was refused, it would be ruin to his family and himself, as well as to the Board's security for the rent. Then the Guardians, on the 24th August, passed a resolution to grant Doyle a lease for 500 years at a rent of £50 per annum on his expending £1400, the lease to be executed on completion of the buildings, and Doyle to surrender the existing lease to the Guardians.

It strikes me as of importance that this was not a unanimous resolution—there were three amendments—but it was ultimately passed by a majority in Doyle's favour, and he signed an undertaking to carry out its terms. To validate the letting by the Guardians, the consent of the Local Government Board was necessary, under section 204 of the Public Health Act, which appears in the second volume of Mr. Vanston's book, page 912. Now the question of this long lease was considered, it appears by some parties, to have been in the nature of a "job," as was also another lease which was offered to a man named Donnelly; and it appears that the matter was referred to in the public Press on the 5th November, and in order to defend his promised lease Doyle, on the 8th November, wrote to Mr. Crimmins a letter in which he defended his own contract and differentiated it from the other case, that of "the other tenant." He was getting anxious, as I gather from that letter, and he illustrated his anxiety by

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writing a letter of the 18th November to the Local Government Board, inquiring whether that Board had sanctioned the lease, to which he received a reply of the 22nd, informing him that the lease had not yet been submitted by the Guardians. Then Doyle wrote to the Guardians, who replied on the 24th, obviously stating that nothing had been done, and then Doyle instructed Mr. Henry, who wrote to the Guardians on the 25th November, sending to them, in order to carry out the resolution of the 24th August, a draft lease and surrender for their approval. It appears then, that on the 28th November, this letter of Mr. Henry came before the Guardians at their monthly meeting, and it was referred to Mr. Fitzgerald. I do not draw the inference that they referred the letter to Mr. Fitzgerald in order that the resolution should be carried out, but to consider it under the circumstances of the case. A few days afterwards—it is suggested on the 6th—without getting the draft lease or surrender approved of, an advertisement was issued by Doyle, who was determined to sell the premises under the old lease with such rights as the resolution gave him, and the advertisement was for a sale on the 16th December. That advertisement is of considerable importance. The particulars are [His Lordship read the particulars, *ante*, p. 350].

Then the 6th condition of sale says [His Lordship read the 6th condition, *ante*, p. 350]. It is obvious that if that resolution of the 24th August was ineffective to the knowledge of Doyle before he sold the property he would be liable in an action for damages for the concealment of his knowledge—that would be plainly fraud causing damage. It is for the plaintiff to prove that this is what occurred here, and we have to consider whether there was any evidence to go to the jury in support of that view.

The sale came to the knowledge of the Guardians, and on the 12th December there was a discussion with regard to it before the Finance Committee. Doyle had both friends and opponents on the Board, as appears by the voting on the former occasion; his premises at Pelletstown are within easy reach of the Guardians' premises at James's Street. On the evidence Doyle knew the days on which the meetings of the Board would be held, and he turned up at the Board premises on either the 12th or the 14th. It is pretty obvious that the 12th was the material day, and that

was the day to which Cole's evidence referred. It was proved by Cole, a Guardian, that on the 12th or 14th Doyle was there, and Mullett was there, one of Doyle's friends, who acted in support of Doyle's view, and he (Cole) was introduced to Doyle in the words: "This is Mr. Doyle, our tenant from Pelletstown." These are words of vast importance in this case—"This is Mr. Doyle, our tenant from Pelletstown."

Cole was a Guardian himself, and "our tenant from Pelletstown" was a subject which might be of great importance before the Board. Cole says Doyle said nothing about the matter of the lease. Cole went into the boardroom, and he seconded the resolution, which is a material one [His Lordship read the resolution, *ante*, p. 359].

There was a close division on that: there was only a majority of one; the voting was seven to eight, and Doyle's friends were beaten; and the course adopted was the moving of a resolution that this matter should stand over for a fortnight to enable Doyle to put the premises up for sale in the meantime, which would amount to a victory for Doyle in that way. On the 14th December the Board adopted the resolution of the Finance Committee, but no division appears to have taken place.

On these facts *was* Doyle there on the 12th? I think there is clear evidence that he was. Cole has proved it. On what business was he there? Considering what occurred before the 12th, and his being there, and being there at that time the advertised seller of Pelletstown, and the words used on the introduction, "our tenant from Pelletstown," is it not clear there was evidence from which a jury might draw the inference that Doyle came on Pelletstown business, and if so, that he did not leave without being told by some one of his seven supporters—notwithstanding the great privacy we are supposed to think attaches to meetings of that character—that the resolution had been passed, which certainly attacked the validity of the resolution of the 24th August; and the sale by Doyle under that 6th condition of sale, having regard to the description given of that resolution, would in such case have been a sale under a fraudulent description.

What is Doyle's answer to that?

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It is this—"I was not there at all either on the 12th or the 14th." If the jury doubted that statement wholly, and disbelieved it wholly, as they were entitled to do, that statement cannot be left out of account. It was an easy way of getting out of it—more easy than saying I was there, but not on Pelletstown business. The jury were plainly at liberty to consider these matters as evidence from which the inference of knowledge could be drawn.

Now the letters passing in January are important, not as showing the state of his knowledge then, but as bearing back on the evidence whether there is any inference of knowledge on Doyle's part of what occurred on the 12th to be drawn.

On the 7th January Mr. Henry writes to the Guardians asking for a copy of the resolution passed with regard to the lease of the premises, and inquiring as to the drafts. On that very day this form was gone through of conveying the premises to Thomas Kelly, which was plainly a "blind." Well, the reply to Mr. Henry's letter was on the 14th—a very singular reply: "The Guardians cannot see their way to accede to the request contained in your letter," *i.e.* the Guardians could not see their way to send a copy of the resolution, or to accede to the request to send back the draft lease and surrender, which would have been important for Mr. Henry to have.

There is evidence that Henry saw Doyle next day and told him of the answer, and we have no evidence to show us that Doyle did anything, or what he said or did, but he apparently remained quiescent having got that information from Mr. Henry that the Guardians refused to send back the draft lease approved of, and that they would not send back a copy of the resolution, or help in any manner whatsoever. I cannot help thinking that this fits in with the theory that something had occurred with regard to the state of the defendant's knowledge on the 12th of December. He first denied that he was told about that letter of the 14th of January at all—something like his answer as to his not having been in St. James's Street on the 12th of December—but having seen the answer of Mr. Henry to the interrogatories, he afterwards said that it might have occurred.

Under the circumstances of the case I cannot say that the judgment of the Court below was wrong in deciding that there *was*

evidence from which the jury might draw the inference that Doyle had knowledge of what passed at that meeting of the 12th; all we have to see is whether there was evidence from which the jury might draw that inference; we do not say they *should* draw that inference or what inference they should draw; we merely decide that there was some evidence from which they could draw that inference of fact.

PALLES, C. B.:—

I agree with the Lord Chancellor, that the order appealed from should be affirmed, on the ground that the evidence given in support of the plaintiff's case antecedent to his having called the defendant as his witness was such as ought to have been submitted to the jury; but I desire to express my total disagreement with one of the arguments addressed to us in support of that order, viz. that, supposing that antecedent evidence were insufficient to be submitted to the jury, its total denial by the defendant could so change its character as to render it sufficient for that purpose. If the passage cited from the judgment of Willes, J. (1), goes to that extent (which, in my opinion, it does not), and is to be regarded as an authority, it would establish a new rule in the law of evidence, which that judgment (being a dissentient one) was incompetent to do.

HOLMES, L.J., concurred with the Lord Chancellor (2).

Solicitors for the plaintiff: *Crowley & Bolger.*
Solicitor for the defendants: *Henry.*

R. ST. J. C.

(1) L. R. 1 P. & M. 708.

(2) On a subsequent trial the jury found a verdict against the defendant Doyle for £200.

K. B. Div. 1906. Oct. 30.

THE KING (M'CARRON) *v.* JUSTICES OF COUNTY DONEGAL (1).

Justices—Conviction—Distinct offences charged—Defendant convicted generally—Alternative statement of offence—27 Geo. 3 (Ir.), c. 35, ss. 10, 11.

M. was charged on summons for that, without being duly authorized, he did go and enter upon the lands of the complainant, provided with a gun, to look for, set, spring, start, follow, shoot, course, hunt, or otherwise pursue, take, or destroy, game, contrary to 27 Geo. 3, c. 35, ss. 10, 11. An order was made by the Justices, "defendant duly convicted and ordered to pay," &c.

Held, that the conviction was bad, inasmuch as several distinct offences were charged, and it did not appear of which the defendant was convicted.

CERTIORARI.

The prosecutor was charged on summons on the complaint of the Hon. Ernest G. L. Cochrane, before the Justices, at the Petty Sessions District of Buncrana, in the County of Donegal, for that, on the 4th day of February, 1906, at Glassmullen, in the said Petty Sessions district in the said county, he, without being duly authorized, did go and enter upon the lands of the complainant, provided with a gun, to look for, set, spring, start, follow, shoot, course, hunt, or otherwise pursue, take, or destroy, game, contrary to the provisions of 27 Geo. 3, c. 35, sections 10 and 11. The Justices made an order, the material portion of which was as follows:—"Defendant duly convicted, and ordered to pay for penalty the sum of £2 sterling forthwith, and in default of payment," etc.

The prosecutor obtained a conditional order for a writ of *certiorari*, to bring up and quash the conviction, on the grounds (*inter alia*)—(*a*) that the summons and order of conviction disclosed alternative offences, and were vague and uncertain, and (*b*) that the order did not state that the defendant did go and enter upon the lands of the complainant provided with a gun, to

(1) Before MADDEN and WRIGHT, JJ.

look for, set, spring, start, follow, shoot, course, hunt, or otherwise pursue, take, or destroy, game "there."

Cause having been shown against the conditional order by the complainant in the summons, the present application was on behalf of the prosecutor to make the order absolute notwithstanding cause.

Patton, for the prosecutor:—

The conviction is bad, inasmuch as the summons charges a number of alternative offences, and it does not appear of which the prosecutor was convicted: *The King* v. *Wells* (1); *R.* (*Vaughan*) v. *The Justices of Meath* (2); *R.* (*Moore*) v. *The Justices of Wexford* (3); *Cotterill* v. *Lempriere* (4).

It is also bad on the ground that it is not alleged that the prosecutor entered the lands to look for, *etc.*, game "there": *Fletcher* v. *Calthrop* (5); *The King* v. *Waterford Justices* (6).

Patchell, *K.C.*, and *Osborne*, for the Hon. E. G. L. Cochrane:—

The offence charged is only one offence, and the several acts mentioned in the summons are merely different methods of committing it.

As to the omission of the word "there," the offence is charged in the words of the section which does not contain that word.

MADDEN, J.:—

We are of opinion that the conviction in this case cannot be allowed to stand. The summons was brought under section 10 of 27 Geo. 3, c. 35, which provides that no person, not being duly authorized, shall go or enter upon the land of any other person "to look for, set, spring, start, follow, shoot, course, hunt, hawk, or otherwise pursue, take, or destroy, any sort of game, . . . and that each and every person and persons offending in any of the particulars herein set forth shall for every such offence forfeit a sum not exceeding £10." It is not necessary to go beyond the

(1) 91 L. T. (N. S.) 98.
(2) 4 New Ir. Jur. R. 36.
(3) 35 Ir. L. T. R. 64.
(4) 24 Q. B. D. 634.
(5) 6 Q. B. 880.
(6) 18 W. R. 161.

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words of this section in order to see that there are several particulars, in respect of each of which an offence, and a different offence, may be committed. This construction is aided by the next section, which provides that no person shall be construed to be within the meaning of the Act as looking for game, unless such person shall appear to be provided with a dog or dogs, gun or guns, net or nets, or some other implements for taking or destroying game. No doubt that section deals with matters of evidence, but at the same time it appears to recognize as distinct offences the "looking for game" and the "taking or destroying game." In *The King* (*Vaughan*) v. *Justices of Meath* (1) the offence of which the defendant was convicted was that he did cruelly illtreat, over-drive, abuse, or torture, or cause or procure such to be done in regard to a horse, and it was held that the conviction, although it followed the words of the Act of Parliament, was bad, on the ground that it did not appear of which of the several modes of cruelty specified in the section the defendant had been guilty. No doubt there is a marked distinction between ill-treating a horse and torturing a horse. But, likewise, there is a marked distinction between looking for game, and taking or destroying game—a distinction which would very probably cause a substantial difference in the amount of the penalty.

Having regard to the clear opinion which I have formed that the conviction is bad on the ground which I have mentioned, I do not think it necessary to consider the effect of the omission in the summons of the word "there." The decision in *Fletcher* v. *Calthrop* (2), that such omission was fatal, seems to have been adopted by FitzGerald, J., in *The King* v. *Waterford Justices* (3), but in subsequent cases this argument does not appear to have been put forward. I rest my judgment on the reasons which I have stated.

WRIGHT, J., concurred.

Solicitor for the prosecutor: *J. E. O'Doherty.*
Solicitors for the Hon. E. G. L. Cochrane: *C. McKay & Co.*

J. G. T.

(1) 4 New Ir. Jur. Rep. 36. (2) 6 Q. B. 880. (3) 18 W. R. 164.

THE KING (BRADY) *v.* THE JUSTICES OF CAVAN (1).

K. B. Div. 1907. Jan. 18, 21. Feb. 28.

Local Government—Urban district council—Right to take gravel, &c.—Transfer of powers—Justices' order—Grand Jury Act, 1836 (6 & 7 *Wm.* 4, *c.* 116, *s.* 162—*Application of Enactments Order,* 1899.

Section 162 of the Grand Jury Act, 1836, as adapted by the Local Government (Adaptation of Irish Enactments) Order, 1899, runs as follows:—"Every county surveyor and every contractor for any work to be executed in pursuance of a resolution of a county council, shall have power and authority to dig for, raise and carry away, in or out of any lands, . . . any gravel, stones, sand, or other materials," &c.; and the section afterwards provides that it shall not be lawful for any such contractor or surveyor to enter any such land for any such purpose against the will of the occupiers thereof without the previous order of a Justice of the Peace:—

Held, that, notwithstanding the omission of the words "urban district council" from the section, as adapted, the powers exercisable under the section by the county surveyor and contractor, under the Grand Jury system, are transferred to urban district councils undertaking the maintenance of the roads in their districts.

Held, also, that, notwithstanding the specific reference in the section, as adapted, to county surveyor and contractor, such powers are exercisable by urban district councils in their corporate capacities.

Held, also, that an order under the foregoing section, limited "during the period of three years, should they (the urban district council) so long continue as aforesaid, or for such portion of said period as they shall so continue"—being a reference to the period for which the district council had undertaken to keep the roads in repair—is not bad for indefiniteness.

CERTIORARI.

Prior to the Local Government Act, 1898, the Town Commissioners of Cootehill were the urban sanitary authority for that town, but the roads and streets within their boundary were wholly maintained and controlled by the Grand Jury of the county of Cavan. By virtue of the Local Government Act the town of Cootehill became an urban district, and the powers and duties of the Grand Jury regarding the maintenance of the streets and roads

(1) Before PALLES, C.B., and MADDEN, J.

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THE KING (BRADY) v. JUSTICES OF CAVAN.

had since been exercised by the Cootehill Urban District Council. On April 19, 1899, the Urban District Council by resolution undertook the entire maintenance of the roads in their district, none of which had been declared to be main roads by the Cavan County Council. On April 9, 1906, the Urban District Council, by resolution at a duly convened meeting, resolved to maintain the roads in the district by direct labour. On 4th June, 1906, the Urban District Council accepted the tender of Owen O'Reilly for the raising and breaking of stones for road material, the quarry mentioned in his contract being on the lands of the prosecutor James Brady. Owing to the objection of the prosecutor, O'Reilly was unable to carry out his contract, and two applications made by him to the magistrates under section 162 of the Grand Jury Act, 1836, were refused, on the second occasion on the ground that he was not a contractor to the Urban District Council within the meaning of the section. A summons was then taken out by the District Council against James Brady, reciting that stones were wanted for the repair of the roads and could not be conveniently procured elsewhere than in Brady's quarry, and calling upon him to show cause why an order to enter the said lands, then and there to dig for, raise, and carry away a sufficient quantity of materials so wanted for public work, should not be granted. Thereupon the magistrates made an order authorizing "the Urban Council of Cootehill during the period of three years, should they so long continue as aforesaid, or for such portion of said period as they shall so continue," to enter, &c. A conditional order was obtained by James Brady to quash the order of the magistrates on the ground—

"That the said order was made without and in excess of jurisdiction; that the order is bad on its face, being made in favour of a party other than those mentioned in the statute, viz., section 162, Grand Jury Act, 1836, as adapted by the Local Government Act, 1898; that the council, having entered into a contract for the delivery to them of material for the repair of the roads, are precluded and estopped from making such an application; that the order is not definite as to the time it will remain in force, there being no dates given."

The District Council showed cause.

M'Loone (with him *Henry, K.C.*), for the prosecutor:—

The order of a Justice authorizing a contractor to enter on lands for the purpose of procuring materials for the repair of a road should limit such right of entry to a definite period: *Reg.* (*Guinness*) v. *Justices of Louth* (1). There are no dates fixed here, and the order is bad for indefiniteness. An order under section 162 of the Grand Jury Act, 1836, is bad on its face unless it gives the right to enter the land to the county surveyor or a contractor—it will not suffice, even if the order gives the right to enter to the council by "its county surveyor" or contractor: *The King* (*Maher*) v. *The Justices of Kilkenny* (2). It follows that an urban district council is not entitled to exercise the powers which, under section 162 of the Grand Jury Act, 1836, belonged exclusively to the county surveyor or a contractor—there is nothing to transfer those powers to an Urban District Council. Furthermore Urban District Councils are omitted altogether from sect. 162, as adapted in the Adaptation of Irish Enactments Order, 1899; therefore, a resolution of an Urban District Council is of no avail under that section.

Law Smith, K.C., and *Edward S. Murphy*, for the District Council, showing cause:—

The time is sufficiently limited by the order of the magistrates: *Reg.* (*Murphy*) v. *Wexford Justices* (3). On the main question, *R.* (*Maher*) v. *Kilkenny Justices* (2) is distinguishable. Sect. 72 of the Local Government Act, 1898, was not cited in that case, and the judgment can be supported on the other ground given in the judgment of Palles, C.B. *R.* (*Collins*) v. *Cork Justices* (4) is an express authority in our favour. Under the Local Government Act, 1898, section 27 (1) b, the business of road repair was transferred from the Grand Jury, who formerly kept the streets and roads of Cootehill in repair, to the Urban District Council, and under section 82 (1) the duty of road repair is imperative: *R.* (*Westropp*) v. *Clare County Council* (5). *Prima facie*, with the duties

(1) [1898] 2 I. R. 248.
(2) 5 New Ir. Jur. R. 113.
(3) [1894] 2 I. R. 81.
(4) [1906] 2 I. R. 487.
(5) [1901] 2 I. R. 569.

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of the Grand Jury, the powers of the Grand Jury were transferred to the Urban District Council. The power of entering lands under a magistrate's order conferred by section 162 of the Grand Jury Act was a power exercised by the Grand Jury, through their officer, the county surveyor. As an evanescent body, powers could be conferred on the Grand Jury only by conferring them on their officers. This power was transferred to the Urban District Council by section 72 of the Local Government Act, 1898, and is vested in the Urban District Council itself under section 72 (2): see *R.* (*Collins*) v. *Cork Justices* (1). The omission of Urban District Councils in section 162 of the Grand Jury Act, as adapted, is not a "limitation" within section 72 (1) of the Local Government Act, 1898. If this section 162 had not been adapted, this power would have passed to the Urban District Councils under section 72; and none of the enabling sections in the Grand Jury Acts as adapted contain express references to Urban District Councils. Under section 27 (4) of the Local Government Act, 1898, the powers conferred on county councils by section 12 of that Act were vested in Urban District Councils; these powers include those conferred by section 162 of the Grand Jury Act, which applies to Urban District Councils with the necessary modifications (section 27 (4)).

Cur. adv. vult.

Feb. 28. PALLES, C.B.:—

Three questions have been discussed during the argument, of which one is a matter of the merest form, which can be disposed of in a moment. The other two involve matters of substance, which gravely affect the rights of urban district councils.

The point of form is that the time during which the urban council are authorized to enter the prosecutor's land is not definitely stated in the order. It is thus described:—"During the period of three years, should they" (*i.e.* the Urban Council of Cootehill) "so long continue as aforesaid, or for such portion of said period as they shall so continue."

(1) [1906] 2 I. R. 487.

The order had previously recited that, at a meeting of the urban council, a resolution to keep in repair the roads, viz., the streets of Cootehill urban district, for the period of three years, was made by the urban council, and that the council undertook the execution of such work.

I am of opinion that the period of three years mentioned in the latter part of the order is the period of three years mentioned in the resolution, and that the meaning of the words "should they so long continue as aforesaid" is, should they so long continue to be authorized to keep the streets in repair.

I am, therefore, of opinion that the order is not objectionable upon this first ground.

This brings me to the two questions of substance. They are—first, whether the powers conferred by sect. 162 of the Grand Jury Act, 6 & 7 Wm. 4, c. 116, apply to urban districts; secondly, if so, do they apply to an urban district council who has undertaken the duty of repairing the roads themselves by direct labour, under the statutes authorizing them to do so.

Section 27, sub-sect. 1, of the Local Government Act enacts—

> "Subject to the provisions of this Act, there shall be transferred to the district council of every urban county district, so far as respects their district, the business of the Grand Jury of the county in relation to public works, the expense of the maintenance of which is not wholly or partly leviable off the county at large."

And, by sub-sect. 6—

> "The council of any urban county district may undertake the entire maintenance of any road in the district, the expenses of the maintenance of which are leviable partly off the county at large."

It has not been suggested during the argument that the Cootehill Urban District Council has not, under these provisions, undertaken the entire maintenance of all the roads within their district.

Section 82, sub-section 1, of the same Act imposes upon every county and district council the duty, according to their respective powers, to keep in good condition and repair all public works (which by sect. 109 are defined to include roads) maintainable at

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the cost of their county or district, and to take all steps necessary for that purpose. Thus, the duty of repairing all roads within their district is thrown upon the urban district council.

By sect. 72, sub-sect. 1, of the same Act, it is provided that any council shall, as respects the business by this Act transferred to them, be subject to the provisions and limitations affecting them, whether in this Act or any Order in Council made under Part 6 of this Act; but, save as aforesaid, shall have all the powers and duties of the authority in respect of the business transferred."

And sub-sect. 2 enacts—

> "There shall be transferred to the county and district council respectively, in relation to any business transferred to that council, all the powers and duties under any Act of any officer of such council other than the treasurer in relation to that business."

It has not been suggested that there is any limitation in the Local Government Act itself, as distinguished from the Order made under it, by which the transfer to urban district councils of the powers of the Grand Juries under sect. 162 of the Grand Jury Act has been affected or limited. It follows, therefore, that those powers have been transferred to the Cootehill Urban District Council, unless that transfer has been prevented or limited by an Order in Council under Part 6 of the Act. The contention of the prosecutor is that it has been prevented by the provision in the Schedule to the Adaptation of Irish Enactments Order, of the 20th January, 1899. By Article 2 of that Order, each of the enactments in the Grand Jury Act mentioned in the schedule was "hereby adapted in the manner and to the extent necessary for the purpose of being read as set out in the said schedule."

Collating the provision adapted in that section with the words of the section itself, it will be found that the only alteration made is that for "Grand Jury presentment" there is substituted "Resolution of a County Council." The contention of the prosecutor is that this is a limitation affecting the transfer which prevents the application of the provisions of sect. 162 to an urban district council. Whether it does or not is the question for our decision.

The Order in Council was made under section 105 of the Act,

which empowered the Lord Lieutenant, by Order in Council, to make such adaptations of certain Irish enactments, including the Grand Jury Act of 1836, as appeared to him necessary or expedient for carrying into effect that Act or any Orders in Council made thereunder; and section 107 provides that such an Order, unless annulled, shall be deemed to have been duly made, and to be within the powers conferred by the Act. We have to determine what is the effect of this Order.

Now, the broad scheme of the Act is to substitute for a Grand Jury, in respect of its principal functions, a county council. But this general scheme is subject to certain modifications, one of which is the transfer, not to the county council, but to the urban district council, of the jurisdiction in respect of certain matters, including roads, within their district. To completely carry out the intention of the Act, the Privy Council Order, as indeed is not to be wondered at in a document of such vast complexity, may be said to be subject to criticism. It is hardly a reflection on the draftsman to say that it would have been better had the words of modification in relation to section 162 pointed to resolutions and officers as well of an urban district council as of a county council. But the question for us is, What is the effect of the words used?

Now, had there been no such Order, the words of the Act would plainly have carried this power to the urban district council; and therefore the question is, Has this effect been prevented by the Order? In other words, are we to read the words as if they were, "a resolution of a county council, but not of an urban district council"? This is a question of intent, to be determined by the construction of the Act and the Order, taken together. Effective operation can be given to the Order, by reading it as substituting a resolution of the county council for a presentment of the Grand Jury, and saying nothing one way or another in relation to the transfer of powers to the urban district council, and therefore leaving the matter to be decided as if that Order had never been made.

In my opinion, that is the true construction. I arrive at that conclusion upon the general intent of the Act, which is, I think, clear, that the substituted authority should have the powers of the

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body whose duties were transferred to them; and that that which was to be effected by the Privy Council Order was to be ancillary to the carrying out of the provisions of the Act.

The construction suggested by the prosecutor here, so far from carrying into effect the Act, would defeat its main and principal intent in relation to all urban districts in Ireland. Such a construction would render the Order neither necessary nor expedient for carrying the Act into effect; and although we are precluded by section 107 from holding that the Order is, for that reason, so far inoperative, we are, in my opinion, entitled to take it into consideration in determining its true object and effect.

Assuming, then, that section 162 applies to urban district councils, the remaining question is, Can the powers thereby conferred be exercised by the council itself, as distinct from its officers?

The powers are by section 162 conferred upon the county surveyor; and as this officer is by section 115 transferred to the county council, they pass to the council under section 72, subsect. 2. But the transfer of officers under section 115 is matter of machinery, and was not intended to differentiate between the substantive rights against third parties of county and urban district authorities. The duties transferred to each authority, in respect of roads, were identical. Certain powers had theretofore been deemed by the Legislature necessary for the due execution of those duties; and there is a total absence of intention that, although the duty should pass, the necessary powers for its execution should, by reason of matters of form or technicality in its transfer, reach the transferee diminished, and therefore inefficient. The distinction between county councils and urban district councils was one which did not affect the powers to repair roads; and the intention was that the powers of each council, whether that of the county or of the urban district, should, in respect of the roads within its own district, be identical, and should be the full powers of the former authority. I therefore apply to the present case the reasoning which I used in *The King* (*Collins*) v. *Justices of Cork* (1),

(1) [1906] 2 I. R. 495.

and I hold that the district urban council acquired under the Act all the powers of the Grand Jury or their officers in relation to the district which was transferred from the Grand Jury to the urban district council. Indeed my view, upon both of the questions I have lastly dealt with, can be summed up in one sentence. It is, that it was the plain intention of the Act to transfer certain jurisdiction from the Grand Jury to councils representing two classes of localities, *viz.*, rural localities and urban localities; that the jurisdiction intended to be so transferred was the *entire* jurisdiction theretofore exercised by the Grand Jury and its officers, in its undiminished fulness; that having regard to the transferees being incorporated bodies, all the theretofore existing powers should vest, and be centred, in the new corporations; and that, although, by reason of the evanescent nature of the Grand Jury, it might theretofore have been found convenient that some of them should be in the officer as distinguished from the Grand Jury, this manifest governing intention demands from us a broad and untechnical construction of the Act and of the Orders; and that their words, when liberally construed, are sufficient to give effect to this intention.

Adopting this construction, I hold that the urban district council can exercise the power conferred upon the county surveyor under section 162 of the Grand Jury Act. The conditional order for the *certiorari* must be discharged; but, under the circumstances, without costs.

MADDEN, J.:—

As this case is of general importance, I shall state the grounds upon which I have come to the conclusion that the order of the magistrate is valid. Before the passing of the Local Government Act of 1898 what is now the Cootehill Urban District formed part of the county at large, and the road authority was the Grand Jury of the county of Cavan. The Grand Jury Act of 1836 contained a section, which has come under the consideration of this Court in several cases, enabling the road authority to provide the necessary material for the construction and repair of roads. The 162nd section authorized every county surveyor and every contractor for work, authorized by the Grand Jury, to dig and carry away road

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material from any land which did not come within defined exceptions, making compensation for surface damage only, the amount to be ascertained in the manner provided by the section, provided that no land could be entered for this purpose against the will of the occupier except under the order of a Justice of the Peace, which he was not only authorized, but required, to grant on its being proved to his satisfaction that the gravel, stones, or other material sought cannot be conveniently procured elsewhere. It is evident that the Legislature when it passed this very drastic enactment was impressed with the paramount importance—in the interest of the public—of providing the road authority with the means of maintaining the highways under its care; a necessity to which the proprietary interests of individuals should be compelled to yield. It is equally plain that those considerations apply with equal force to the position and duties of any body to which the powers and duties of the Grand Jury, as the road authority, might be transferred. These powers and duties were transferred by the Local Government Act to the urban district council, so far as the area of the district extends. The council has authority under Art. 8 of the General Orders of 21st May, 1899, to appoint a town surveyor, who occupies substantially the same position with regard to the district council as the county surveyor did in regard to the Grand Jury. The position of the district council and of the town surveyor was considered in this Court in *The King* (*Collins*) v. *Justices of Cork*(1). It was there held that where jurisdiction and authority in regard to a road had been transferred from a Grand Jury to an urban district council, the consent of the district council, or their authorized officer, satisfies the requirements of sect. 9, sub-sect. 3, 14 & 15 Vict. c. 92, by which a fine may be imposed on any person breaking up the surface of a road, "unless with the consent of the county surveyor, or by the authority of any presentment." The reasons upon which that decision was founded are precisely applicable to the present case. If there were no persons capable of giving the required consent, the statutory protection afforded to road authorities would cease to exist in all urban districts circumstanced as in the

(1) [1906] 2 I. R. 457.

present case. Unless the powers vested in the Grand Jury can be exercised by the urban council, or their officer, the statutable provisions which were considered necessary to secure a supply of road material would disappear from the statute book so far as regards urban districts in Ireland which have no special statute. The Lord Chief Baron, after pointing out the position of the county council in regard to an evanescent body, such as the Grand Jury is, and the effect of the transfer of powers and jurisdiction from such a body to a corporation capable of exercising the powers by independent officers, or by their servants, held that the power then in question, "and the other powers incidental to the repairs of the transferred roads, passed, not to any particular officer—for the officers were not transferred—but to the new authority itself, which, as constituted under the Act, was *per se* capable of being burthened with, and of performing, duties." Applying the principles of this decision, I am of opinion that the powers conferred by sect. 162 on the Grand Jury, in favour of their county surveyor, were transferred to, and are exercisable by, the urban council as regards the district under its control as road authority.

An argument has been founded on the terms of the Local Government (Adaptation of Irish Enactments) Order of 1899, made under section 105 of the Local Government Act. That section enables the Lord Lieutenant, by Order in Council, to make such adaptations of the scheduled statutes, in which the Grand Jury Acts are included, as might appear to him to be necessary or expedient for carrying into effect the Act, or any Order in Council made under it. The schedule to the Order of 1899 sets forth sect. 162 of the Grand Jury Act of 1836, adapted to the case of a county council and a county surveyor. It contains no provision adapting this section to the case of an urban district council and town surveyor. But the failure to provide for this particular application of the section, which was probably overlooked in the multiplicity of arrangements rendered necessary by the Local Government Act, cannot repeal or in any way affect the operation of this section of the Grand Jury Act. The Application of Enactments Order operates in the cases for which it provides. Where its provisions do not apply, the application of any pre-existing statute to the

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system substituted by the Local Government Act must be decided upon general legal principles. I do not, therefore, attach any importance to the manner in which sect. 162 of the Grand Jury Act has been dealt with in this order. In my opinion the powers of the Grand Jury as road authority under the 162nd section of the Grand Jury Act have been and are vested in the urban district council, and can be exercised by them.

Solicitor for the prosecutor: *William Boyle.*
Solicitor for the District Council: *Charles E. Murphy.*

J. L.

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Feb. 3, 5, 11.

THE ATTORNEY-GENERAL *v.* BIGGS (1).

Revenue—Succession duty—Predecessor—Settlor—Marriage portion—Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 10.

A step-daughter, who was contemplating marriage, was possessed of forty-five shares in the National Bank, which had been presented to her by her step-father. These shares, at the request of the step-father, who told her that he had left her much more than their value, she handed over to her brother, and the step-father gave her a "marriage portion" of £5000, which was put in settlement. The step-father died shortly after the marriage, and by his will, which was made some months before the marriage, he left the step-daughter a legacy of £5000. In a former suit in Equity the step-daughter and her husband had established that this legacy was not adeemed by the marriage portion of £5000, and, upon the death of her husband, the Inland Revenue Commissioners claimed from the eldest son of the marriage, who was the successor, succession duty, under the Succession Duty Act, 1853, sections 2, 10, at the rate of 10 per cent. in respect of the £5000 put in settlement, upon the ground that the predecessor was the step-father, a stranger in blood. The eldest son contended that it was his mother who settled the £5000, and that she was the predecessor, in which event succession duty at the rate of 1 per cent., and no more, would be payable:—

Held, that, before and at the time of the settlement, the £5000 put in settlement belonged to the step-father and not to the step-daughter, and that he was the predecessor.

Held, also (*per* Gibson and Kenny, JJ.), that, notwithstanding the use of

(1) Before JOHNSON, GIBSON, and KENNY, JJ.

the word "portion" in the settlement, the step-father, and not the step-daughter, was to be deemed the settlor.

Ward v. *Dyas* (I.J. & G. *temp.* Sugden, 177) observed upon and distinguished.

INFORMATION at the suit of the Attorney-General submitting that succession duty at the rate of £10 per cent. became payable by the defendant in respect of a certain sum of £5000 under the provisions of sects. 2 and 10 of the Succession Duty Act, 1853, the predecessor of the defendant being a stranger in blood. The question arose upon the marriage settlement of Samuel Dickson Biggs and Elizabeth Geraldine Goodwin, which was dated 1st June, 1870. Prior to the marriage, Elizabeth G. Goodwin, and her brother, Joseph A. Goodwin, had been living with their mother and their mother's second husband, William Johnston, a gentleman of considerable property, both real and personal. William Johnston had no near relatives of his own, and was devotedly attached to the two children of his wife. In the years 1867 and 1868, he made a gift to Miss Goodwin of forty-five National Bank shares, the value of which at the date of Miss Goodwin's marriage was £2600, and on 22nd March, 1870, he made a will in which he bequeathed "To my step-daughter, Elizabeth G. Goodwin (in addition to the forty-five shares in the National Bank, which I have made her a present of some time since), I give, devise, and bequeath the sum of £5000." About the middle or end of April, 1870, when Elizabeth J. Goodwin, who was then aged twenty-two years, or thereabouts, became engaged to Samuel Dickson Biggs, she transferred the forty-five National Bank shares, at the request of William Johnston, to her brother, Joseph A. Goodwin. Two days before the marriage William Johnston said to her, "I am taking the National Bank shares from you, but you will feel no disappointment hereafter, as I have left you in lieu of them much more than their value, but my motive in doing so is for fear your husband might suffer if the bank failed."

By the settlement executed upon the marriage, reciting that Samuel Dickson Biggs was seized of an estate in fee-farm of certain lands in the counties of Limerick and Tipperary, and of an estate in fee-simple in certain lands in the county of Tipperary,

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all which lands were subject to certain incumbrances mentioned in the schedule thereto (consisting of a mortgage for £5000 and charges of £1000 and £84 12*s.* 3*d.*), and also reciting an agreement that the said lands should be limited as thereinafter mentioned, and that the marriage portion of Elizabeth Geraldine Goodwin should be applied in payment and satisfaction of said charges, it was witnessed that in consideration of the marriage, and of £5000, the marriage portion of Elizabeth Geraldine Goodwin, in hand, paid by William Johnston to Charles Eiver Young and Joseph Alfred Goodwin, the said lands were limited to George Washington Biggs and Garrett Curtin, their heirs and assigns, to the use of the said Samuel Dickson Biggs until the said marriage, and after the solemnization thereof to the use of the said Samuel Dickson Biggs and his assigns during his life, and after his decease to the use that, if the said Elizabeth Geraldine Goodwin should survive the said Samuel Dickson Biggs, she might thenceforth receive during her life the yearly rent-charge of £300, to be increased in the events therein mentioned, and subject thereto to the use of the said Charles Eiver Young and Joseph Alfred Goodwin, their heirs, executors, administrators and assigns, for the term of 1000 years, upon trust, to secure the payment of the said rent-charge, and to raise the sum of £4000 for younger children as therein mentioned, and from and after the expiration or sooner determination of the said term, to the use of such son of the said marriage, and the heirs of the body of such son, as the said Samuel Dickson Biggs should by deed or will appoint, with remainder in default of appointment to the use of the first and other sons of the said marriage successively in tail male, with remainder in default of such issue to the use of the daughters of the said marriage as therein mentioned, with ultimate remainder to the use of the said Samuel Dickson Biggs, his heirs and assigns. And it was thereby agreed that the sum of £5000, so paid to the said Charles Eiver Young and Joseph Alfred Goodwin, or the trustees or trustee for the time being, should be applied by them in payment of the said sums of £5000, £1000, and £84 12*s.* 3*d.*, mentioned in the schedule thereto, and that until such payment the said trustees or trustee should invest the said sum of £5000 in any of the public stocks or funds of Great Britain, or upon

Government or real securities in England, Wales, or Ireland, and should vary such investment as they should think fit, and should apply the annual income thereof in or towards the payment of the interest of said charges, and subject to the payment of the principal and interest of said charges should hold the said sum of £5000 upon the trusts thereinbefore declared respecting the said lands, or as near thereto as the circumstances would permit.

The defendant was the eldest son of this marriage.

Upon the 31st August, 1870, William Johnston died, without having altered or revoked his will of the 22nd March, 1870, and the question at once arose as to whether the legacy of £5000 given to Elizabeth G. Goodwin was not adeemed by the marriage portion of £5000 put in settlement for her by her step-father, or whether the presumption against double portions was not rebutted by the circumstances of the case. The question was argued before Sir Edward Sullivan, M.R., in *Curtin* v. *Evans* (1), and after voluminous affidavits had been put in evidence, it was decided that the legacy had not been adeemed. These affidavits are fully set forth in the report (1), and the facts stated in them were treated as admitted in the present proceedings. Samuel Dickson Biggs died on the 2nd November, 1904, and by the exercise of the power of appointment contained in the settlement, and by virtue of a certain disentailing deed, and a deed of re-settlement, the defendant was now, as tenant for life, entitled to the lands and property contained in the original settlement. The sum of £5000 paid by William Johnston to the trustees of the settlement was fully applied in discharging the mortgages on the lands comprised in the settlement. The Attorney-General contended that full succession duty was payable after the death of Samuel Dickson Biggs, as the £5000 was paid out of the proper moneys of William Johnston, a stranger in blood to the defendant. The defendant contended that the predecessor from whom the sum was derived was not William Johnston but Elizabeth G. Goodwin, his mother.

(1) I. R. 9 Eq. 553.

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The Attorney-General (*The Right Hon. R. R. Cherry*), *The Solicitor-General* (*Redmond J. Barry, K.C.*) (with them *Coll*), in support of the information:—

The predecessor was William Johnston and not Elizabeth Geraldine Goodwin. It was William Johnston who provided the moneys. If it is contended that the £5000 was the absolute property of Elizabeth G. Goodwin, marriage or no marriage, and to pass to her personal representative if she died, at what point of time did it become her property? Physically speaking, it was never in her hand. In order to support his case, the defendant must show that the £5000 became the property of Miss Goodwin by the operation of something *dehors* the settlement; yet there is nothing in the history of the case to transfer the money except the settlement itself. The defendant cannot make the case that the £5000 brought into settlement was taken by Elizabeth G. Goodwin in exchange for the National Bank shares, because the view taken by Sir Edward Sullivan, M.R., in *Curtin* v. *Evans* (1) was that she gave up the National Bank shares upon the undertaking that he would provide for her in his will. [They referred to *Ramsay's Case* (2); *Attorney-General* v. *Rathdonnell* (3); and *Attorney-General* v. *Riall* (4).]

C. A. O'Connor, K.C., and *Corvan*, for the defendant:—

The step-daughter was the settlor: see the dictum of Lord St. Leonards: "The father provides the portion and the child settles it": *Ward* v. *Dyas* (5). There was a complete gift by the step-father to the step-daughter cut down by the limitations of the settlement: see Norton on Deeds, p. 377. The step-daughter was the owner of £2600 worth of National Bank shares: and the substance of the transaction was that she was to give up the National Bank shares and the step-father was to give her a portion. The dealing with the National Bank shares strongly supports our contention that there was a gift to her independent of the settlement. This was manifestly the view taken by Sir Edward Sullivan in *Curtin* v. *Evans* (1); for he says, at p. 557: "It is fairly enough

(1) L. R. 9 Eq. 553.
(2) 30 Beav. 75.
(3) 32 L. R. Ir. 574.
(4) [1906] 2 I. R. 122.
(5) Ll. & G. (*temp.* Sugden), 177.

admitted by counsel for Mr. and Mrs. Biggs that the case is to be looked on as if Mr. Johnston was *in loco parentis*, and that the £5000 is to be taken as advanced to Mrs. Biggs, notwithstanding the destination of it in the settlement." The use of the word "portion" in the settlement also aids our contention. [The following cases were also referred to: *Re Nash* (1); *Doyle* v. *Crean* (2); *Maule's Case* (3).]

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Cur. adv. vult.

Feb. 11.

Johnson, J.:—

This is an information by the Attorney-General claiming succession duty at the rate of £10 per cent. in respect of a sum of £5000 comprised in the settlement of 1st June, 1870, made on the marriage of Samuel D. Biggs with Elizabeth G. Goodwin and, pursuant to the trusts of this settlement, applied in discharging mortgages on the lands thereby settled by the intended husband, S. D. Biggs. Miss Goodwin was the step-daughter of Mr. W. Johnston, a gentleman of considerable property, real and personal, who had married her mother, then a widow with two children by her former husband. Having no near relations of his own, he appears to have been affectionately attached to his wife's son and daughter, to whom he stood *in loco parentis*. In 1867 or 1868, Johnston made a gift of forty-five National Bank shares, the value of which at Miss Goodwin's marriage was £2600; and on the 22nd March, 1870, he made a will in which he bequeathed "To my step-daughter, Elizabeth Geraldine Goodwin (in addition to the forty-five shares in the National Bank which I have made her a present of some time since) I give, devise, and bequeath to her the sum of £5000." After the death of Johnston a suit to administer his estate was instituted in which Miss Goodwin successfully claimed this legacy of £5000 as not adeemed by the gift which the testator made of £5000 comprised in her marriage settlement. That suit is reported under the title of *Curtin* v. *Evans* (4), and the parties to this present proceeding have agreed that the affidavits in that suit are to be used as evidence in the present case. The contention of the Attorney-General in this case is that the £5000

(1) 51 L. J., Ch. 511.
(2) [1905] 1 I. R. 252.
(3) 56 L. T. (N. S.) 611
(4) I. R. 9 Eq. 553.

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comprised in the said marriage settlement was paid out of the proper moneys of Johnston (par. 6 of the information), and that he therefore was the predecessor to whom Miss Goodwin was a stranger in blood. The contention of the defendant, George Washington Biggs (the eldest son of the marriage), is (par. 6 of answer) that there was a complete gift of this £5000 by Johnston to Miss Goodwin, and it was she who brought that sum into settlement. Further (par. 7 of answer), that previous to the date of the settlement Miss Goodwin was the owner in her own right of said forty-five shares in the National Bank, and, in consideration of giving up said shares, Johnston gave her a marriage portion of £5000, and she thus became in her own right the owner of said £5000, which was brought into settlement by her, and that she therefore is the predecessor. The question for decision is whose money was paid by Johnston to the trustees of the settlement to be applied by them pursuant to the trusts of the settlement.

In her affidavit in *Curtin* v. *Evans*, Miss Goodwin (then Mrs. Biggs) says (1):—"In or about the middle or end of the month of April, 1870, being then aged twenty-two years or thereabouts, I became engaged to my husband, with the complete approval and full sanction of said William Johnston, and I say that some short time after I became engaged to my said husband, I transferred said forty-five National Bank shares, at the request of said W. Johnston, to my brother Joseph A. Goodwin, and I did so because I was requested so to do, and without giving any thought or consideration to the transaction, or thinking that said W. Johnston was in any way affecting or lessening his bounty to me. And I say that two days before my marriage said W. Johnston said to me, 'I am taking the National Bank shares from you; but you will feel no disappointment hereafter, as I have left you in lieu of them much more than their value, but my motive in doing so is for fear your husband might suffer if the bank failed.' And I say that when he said so, said sum of £5000 was paid, or about to be paid, over." Young, in his affidavit, p. 560, says:—"Said W. Johnston stated to me that he would give his step-daughter, said E. G. Goodwin, £5000 on her marriage, and that he would leave her more after." Mrs. Johnston

(1) I. R. 9 Eq. 559.

(W. Johnston's widow) says, in her affidavit, p. 561, she was present when said W. Johnston said to Mrs. Biggs, then Miss Goodwin: "I am taking the National Bank shares from you; but you will feel no disappointment hereafter, as I have left you in lieu of them much more than their value, but my motive for so doing is for fear your husband might suffer if the bank failed"; and in her further affidavit (p. 562) she says, after Miss Goodwin left the room, Johnston said to her she need not feel disappointed at his taking the shares from her, as he had left her much more than their value, and which was (as he stated) in addition to the £5000. She says also, this occurred about two days before her daughter's marriage, and "as I best recollect and believe, the sum of £5000, the marriage portion so given to his step-daughter, was actually paid over on that very day by him."

It thus appears that Johnston had taken up, and that Miss Goodwin voluntarily gave up, the bank shares, and need not be disappointed because he had "left" her (that is by his will, as in fact he had) much more than their value, and so far this negatives the defendant's contention that, in consideration of giving up the bank shares, Johnston gave her a marriage portion of £5000. There is no further evidence except what is to be gathered from the settlement itself, which is dated 1st June, 1870; and the parties to it are S. D. Biggs (the intended husband), first part; W. Johnston and Miss Goodwin (the intended wife), second part; trustees of a term to secure her jointure and portions for her younger children, third part; and trustees to uses, fourth part. It recites the intended husband's title to certain lands subject to the charges in the schedule thereto and the intended marriage, and that "upon the treaty for the marriage it was agreed that said lands, hereditaments and premises, should be limited as hereinafter mentioned, and that the marriage portion of said E. G. Goodwin should be applied in payment and satisfaction of said charges," and witnesses that "in consideration of said marriage and of the sum of £5000, the marriage portion of E. G. Goodwin, in hand paid by Johnston to the trustees who acknowledge the receipt, the intended husband conveys the lands to the use of himself till the marriage, and after to the use of himself for life, with remainder to the use of a

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jointure of £300 a year (in the events which happened) for the intended wife for her life, with remainder to trustees for a term of 1000 years to secure the jointure and portions for younger children, and then in strict settlement. And it was thereby agreed that the said sum of £5000 so paid to the trustees "shall be applied by them in the payment of the sums of £5000, £1000, and £84 12*s.* 3*d.*, mentioned in the schedule thereto," and until such payment should be "invested and held on the trusts hereinbefore declared of the said lands or as near thereto as circumstances will admit." This settlement was executed by all the parties except the trustees to uses, and contains at foot the following receipt clause:—"Received from the above-named W. Johnston the sum of £5000, being the consideration money mentioned in the foregoing deed, to be paid to us the day and year first above written," signed by the trustees. This £5000, therefore, was the money of Johnston until he paid it to the trustees of the settlement, and there is no evidence that it ever was in the possession or enjoyment or under the control of Miss Goodwin. The marriage took place and this £5000 was applied in paying off the scheduled mortgage of £5000. The evidence *dehors* the settlement is, that he promised his step-daughter a marriage portion of £5000 as a voluntary gift, and the settlement recites the marriage treaty that this £5000 should be applied in discharging the scheduled incumbrances on the settled lands, leaving the lands clear for the wife's jointure and portions for her younger children and subject to that for her issue in strict settlement. Johnston paid the £5000 to the trustees, who acknowledge the payment to them by him for application on the trusts of the settlement as it was applied. Thus, on the treaty for the marriage, Johnston discharged his voluntary promise to give £5000 as a marriage settlement for his step-daughter, by agreeing to pay that sum to the trustees of the settlement, and dedicating it to the discharge of the incumbrances on the lands settled to secure her jointure and portions for younger children and, subject thereto, settled in strict settlement on her issue; and he did accordingly so pay and dedicate it. This £5000 was not paid to or through her; it did not pass through her hands, and she never possessed or enjoyed or controlled it. There was no complete gift of it to her, nor did she bring it into settlement.

It was paid by her step-father to the trustees of her settlement for the benefit of herself and her children, and until so paid, it was Johnston's proper money. He therefore was the predecessor, and, in my opinion, judgment should pass for the Crown.

GIBSON, J. :—

If the £5000 belonged to Miss Goodwin before and at the date of the settlement, unquestionably she was the settlor. Looking at the parol evidence and the settlement together, I think that such ownership is not made out. The resumption of the bank shares proves nothing. If the £5000 was wholly, or in part, obtained by Miss Goodwin in consideration of the surrender of the shares, the argument and decision in *Curtin* v. *Evans* (1) would have been unmeaning, as on that view, the money being her own, and representing a fund bought by her, no question of ademption by voluntary advancement on Mr. Johnston's part could have arisen. Mr. Johnston, on the occasion of the intended marriage, rearranged his general financial dispositions, and got back the shares, not in view of the settlement, but partly in contemplation of a change in his will, and partly from a desire to free Mr. Biggs from liability on the shares—a liability which would only exist if he took *jure mariti*, and if the shares were not settled. In *Curtin* v. *Evans* (1) it was assumed that the £5000 belonged to Johnston up to the execution of the settlement, and the question was whether the advancement by and under the settlement constituted an ademption. That it was *prima facie* an ademption is taken by the Master of the Rolls as clear (see p. 557). The shares were referred to as rebutting the *prima facie* inference of ademption. That a legacy may be adeemed by an advancement, notwithstanding that such advancement is put in strict settlement, is quite certain: *Lord Chichester* v. *Coventry* (2).

In *Edgeworth* v. *Johnston* (3) the principle was extended to a case where the ultimate limitation in the settlement was in favour of the father, so that the full benefit of the adeeming advancement was not confined to the child and issue. Would not the same result ensue if an interest was reserved to the father till marriage?

(1) I. R. 9 Eq. 553. (2) L. R. 2 H. L. at p. 92. (3) I. R. 11 Eq. 326.

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Such reservation would hardly alter the character of the advancement. The money here is not stated to be paid to the trustees at Miss Goodwin's request, and the receipt clause suggests that the money was Johnston's.

If there was no gift outside and apart from the settlement, Mr. O'Connor next contends that the settlement of itself shows that Miss Goodwin was made absolute owner of the money, and was entitled to settle it. This proceeds on the use of the word "portion" in an ordinary marriage settlement made by a parent on a child, whether son or daughter, whether of land or money; the settlor is plainly the father from whom the property is derived.

Before considering *Ward* v. *Dyas* (1), and other cases relied upon by the defendant, I will say a few words as to the principle of the thing.

What is to be considered is, who is in reality and substance the settlor—a matter not determined by an accidental use of particular phraseology. The Court should strive not to impose upon a familiar transaction a construction repugnant to common understanding, and to what is called "the truth and honour of the settlement." Where money is proposed to be advanced by way of settlement on an intended marriage, the father, if the marriage goes off, is clearly entitled to have the property reconveyed; otherwise unexpected casualties, such as death, the refusal of either of the parties to marry, going into religion, sudden insanity, or marrying some one else, might defeat the intention of the settlor.

Whether in contracts (*Jackson's Case* (2)) or in settlements (*Essery* v. *Coulard* (3); *Bond* v. *Walford* (4)), the principle is the same. A contract made with reference to certain anticipated circumstances cannot be applied to other circumstances not contemplated when the contract was made. Counsel for defendant boldly argued that under this settlement the daughter was recognized as absolute owner subject to the settlement, and that by refusing to marry she would have been at liberty, being settlor, to get rid of the deed, as it represented merely her own wishes.

(1) I.l. & G. *temp.* Sugden, 177.
(2) L. R. 8 C. P. at p. 581.
(3) 26 Ch. D. 191.
(4) 32 Ch. D. 238.

This argument is wholly untenable. The settlement was conditional on the contemplated marriage becoming a fact. If so, why attribute the settlement to Miss Goodwin's sole volition, and reduce Johnston's position from disponer to that of bare adviser, whose counsels the lady could disregard?

Settlements are drawn in many different forms; sometimes reserving expressly the settlor's estate till marriage, sometimes (as here) not.

Where the declared trusts do not explicitly exhaust the property settled, the Court has to make its choice between resulting trust and an inference or implication of absolute gift. Resulting trust depends on the absence of intention in the settlor, in the event of failure or termination of the trusts, to make a final and complete alienation, and can only operate in favour of the settlor. The inference or implication of absolute gift arises where an intention to exclude any resulting trust appears, and there are words sufficient either in recital or elsewhere to show that the child, subject to the declared trusts, was to be treated as absolute owner.

Instances of a *prima facie* resulting trust being rebutted are *Smith* v. *Cooke* (1); *Re Andrew's Trust* (2); *Connack* v. *Edwards* (3).

In wills it is often a question whether there is a complete gift subject to trusts, or whether the interest is confined to the specific limitations. An example of this will be found in *Hancock* v. *Watson* (4). In many of the cases "resulting trust" is used inaccurately as referring to an interest raised by implication from the inapplicability of the particular trusts.

In the present case there could be no possibility of resulting trust or implication (so far as the actual limitations) of an enlarged estate in the lady. The point turns on whether the word "portion" (*a*) indicates complete ownership in the daughter subject to the trusts; (*b*) whether, if she be such owner, she is to be regarded as settlor.

I now turn to the authorities. *Ward* v. *Dyas* (5) is not

(1) [1891] A. C. at p. 300.
(2) [1905] 2 Ch. 48.
(3) [1896] 2 Ch. 679.
(4) [1902] A. C. 14.
(5) 1 I. & G. *temp.* Sugden, 177.

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referred to in Gamble and Barlow's Digest, or in any English case, or in any text-book on settlements or trusts. Its authority has, however, been frequently recognized in our Courts.

The point actually decided was that, the settlement trusts not exhausting the property, the father was not entitled to the fund on the footing of resulting trust, and that the daughter was absolute owner.

The judgment puts this on the ground, which seems to me an unnecessary fiction, that the daughter was to be regarded as settlor, in whose favour there was a resulting trust, and not on the ground (which in my opinion would have been more satisfactory) that the instrument disclosed an intention, subject to the trusts, to give the property outright to the daughter.

The objection to the theory of the judgment is that it makes: (1) the one instrument operate first as proving an absolute gift apart from and before execution, and then as a disposition by the daughter of such gift at another and later time; (2) it takes no notice of the ownership of the fund if the marriage for any reason failed to take effect.

In *Dennchy* v. *Delaney* (1) (a case of executory trust where the Court would enjoy greater liberty of inference), the father's claim was also excluded, the *ratio decidendi* being (see p. 384) that a father devoting a sum to his daughter's fortune on her marriage, has no right (in the absence of express agreement) to demand it back.

Sir E. Sullivan does not describe the daughter as settlor. The same view was taken by Barton, J., in *Doyle* v. *Crean* (2). His judgment is based on the special context and frame of the settlement.

Assuming that the word "portion" as used in this deed might bear the same meaning as was placed on it in the above cases (which may be doubtful), and assuming that if the trust had not exhausted the property, what was left would have belonged to Mrs. Biggs, and not to Johnston, I cannot hold that in the present settlement, where there can be no question of resulting trust,

(1) I. R. 10 Eq. 377. (2) [1905] 1 I. R. 252.

Mrs. Biggs, for finance purposes, is to be regarded as settlor. *Attorney-General* v. *Maule* (1) is in favour of this view. There the father was held to be settlor. The reservation of the father's right, if the marriage fell through, on which the Court there relied, only expressed what would be implied in law. In *Nash's Case* (2) an interest until the marriage was reserved to the father. This was not the *ratio decidendi*. Though the word "portion" was used, the father was held to take under a resulting trust. The argument for the daughter was that she took absolutely. The suggestion that she could claim under a resulting trust by the fiction of her being the settlor was not put forward. Her case was based on the inference of absolute gift, in my opinion the true ground.

If the settlement in *Ward* v. *Dyas* (3) had contained a similar clause in the father's favour till marriage, would it have affected the Chancellor's conclusion? That there may be a complete advancement for the purpose of ademption, though a benefit is reserved to the father, is decided in *Edgeworth* v. *Johnston* (4). The trifling diminution in value of the advancement from a reservation of income till marriage hardly appears sufficient of itself to decide whether the father or daughter should be entitled to the undisposed of trust property.

Mr. O'Connor relied on the familiar law that an appointment by settlement to persons not objects of the power, with the concurrence of the proper beneficiary, has a twofold option, first as an appointment to the beneficiary, and then as a settlement by him. This depends on different considerations. One deed takes the place of two, and the Court interprets the transaction *ut res magis valeat*, and not as a fraud on the power.

I have no doubt that in substance and fact Mr. Johnston was settlor, and that the theory, suggested in *Ward* v. *Dyas* (3), to exclude the father, does not compel the Court to place upon this marriage settlement, which is a complete disposition excluding any resulting trust, a meaning which the parties never intended it to bear. The settlement was one entire indivisible transaction

(1) 56 L. T. (N. S.) 611.
(2) 46 L. T. (N. S.) 97.
(3) Ll. & G. *temp.* Sugden, 177.
(4) I. R. 11 Eq. 326.

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and cannot be split into two parts—first, a free gift, and then a subsequent settlement by the donee of such gift.

KENNY, J. :—

But for the reasoning of Sir Edward Sugden in *Ward* v. *Dyas* (1), I should have had no difficulty in this case. Miss Goodwin would appear to have had no property save what she derived through the bounty of her step-father, William Johnston. He had presented her with forty-five shares in the National Bank, equivalent to about £2600,—he had given her a considerable legacy by his will,—and he finally dedicated, either to her or to the trusts of her settlement on the occasion of her marriage, a sum of £5000. I cannot think that she became a purchaser of the latter sum by allowing him to transfer the forty-five shares out of her name. In my opinion, that transfer formed part of a wholly different transaction, unassociated, so far as contract was concerned, with the financial arrangements for the marriage. If the lady could be held to have purchased the dowry that was put in settlement, *cadit quæstio*. But the evidence as reported in *Curtin* v. *Evans* (2) and the form of the settlement satisfy me that at no time was she, nor did she purport to be, the owner of the £5000. Up to the moment of the execution of the settlement William Johnston, and he alone, was entitled to it. Is it then to be held that, because out of his mere bounty he had dedicated this sum to the uses and trusts of the settlement, he is to be deemed to have bestowed it as a gift upon his step-daughter, and that the real settlor in the case is the step-daughter, and not the person who, in the first instance, supplied the fund? In *Ward* v. *Dyas* (1) the question was as to a resulting trust, and it was held, in facts somewhat similar to those in the present case, that the daughter and not the father who had covenanted to pay the marriage portion was entitled to the latter on failure of the trusts declared by the settlement. In his judgment, Sir Edward Sugden uses the phrase, "the father provides the portion and the child settles it." With all the deference that is due to so great an authority, I find

(1) Ll. & G. *temp.* Sugden, 177. (2) I. R. 9 Eq. 553.

a great difficulty, in such a settlement as that in *Ward* v. *Dyas* (1), in seeing how it could be said that there is anything in the nature of a *gift* to the lady about to be married. There is a dedication of a sum of money to the trusts of the settlement, but the person who dedicates it is the person who provides it, and I cannot follow the reasoning which deduces a gift to the lady and a settlement by her. But, however that may be in the case of a resulting trust, it seems to me that the question as to the individual who, in such circumstances, should be regarded as the "predecessor" had the Succession Duty Acts then been in existence, is left untouched. Sir Edward Sugden was not considering the meaning of the word "predecessor" as understood in the Succession Duty Acts, and, in my opinion, it does not at all follow that, because a resulting trust arose in favour of the lady, it necessarily involved the determination that she should be regarded as the "predecessor." I consider that the "predecessor" is the person who provides the property, and who is the instrument of settling it. It seems to me that William Johnston fulfilled both conditions, and is the "predecessor" within the meaning of the Succession Duty Acts.

Solicitor for the Attorney-General: *The Solicitor for the Inland Revenue.*

Solicitor for the defendant: *J. S. B. Vanston.*

J. L.

(1) Ll. & G. *temp.* Sugden, 177.

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Appeal.

April 18, 19.

O'FLAHERTY *v.* BROWNE (1).

Gift—Incompleteness—Intended transfer of money—Deposit receipt of money in bank—Invalid declaration of trust—Charity.

O., who was parish priest of B. in the county of Kerry, on the 15th June, 1905, lodged a sum of £60 for Masses on deposit receipt in the branch of the National Bank at Killarney. The deposit receipt was in the form—"Received from the parish priest of Barraduff the sum of £60 for Masses, to be accounted for at our office here." On the same day he lodged on deposit receipt in the same bank in a similar form a sum of £50 for the parish priest of B., for repairs and building to church. On the same day he also lodged two sums of £385 each in the joint names of himself and each of two nieces. This was done in consequence of a conversation with the bank manager, during which O. stated that he wished to give the two sums of £50 and £60 for the purposes mentioned; but he did not wish to make a will. Two days after O. drew out the £50 lodged on deposit receipt for repairs to the church, and placed the amount to the credit of his current account.

On the 21st September, 1905, O. lodged a sum of £100 on deposit receipt in the same bank for the parish priest of B., for repairs and building to church. This was done in consequence of a conversation with the bank manager, at which two other persons were present, in which O. stated that he desired to leave this sum of money to his successor for repairs to the church. This £100 was made up by taking £50 from each of the deposit receipts in favour of the nieces. O. died on the 15th November, 1905:—

Held, by the King's Bench Division, that the gift of £60 for Masses and £100 for repairs of the church were good charitable gifts, and that the successor of O. as parish priest of B. was entitled to the amount.

Held, by the Court of Appeal (reversing the decision of the King's Bench Division), that, as the money on deposit receipt remained in the possession and under the control of O. during his life, the relationship of the bank and O. was that of debtor and creditor, and that a valid trust had not been created.

The Rev. Maurice O'Flaherty, who was for a number of years parish priest of Barraduff and Glenflesk, in the county of

(1) In the King's Bench Division, before Lord O'Brien, L.C.J., and Johnson, Boyd, and Wright, JJ.

Kerry, was a customer of the National Bank, and kept his account at their branch in Killarney.

On the 30th May, 1905, the Rev. Michael Costelloe, his curate, and Miss Mary Griffin, his niece, called at the bank in Killarney, at the request of Father O'Flaherty, and withdrew all his money standing in the bank to the amount of £881 5*s.* 2*d.*

On the 15th June, 1905, Mr. O'Bryen, the bank manager, had an interview with Father O'Flaherty at his residence, when he told him that it was foolish to keep his money locked up in boxes in his house. Father O'Flaherty replied that he did not wish to make a will, and that he wished to leave all his money, free of expense, to his two nieces—Mary Griffin and Hannah Griffin. He further stated that it was his wish to leave to his successor, as parish priest of the said parish, a sum of £60 for Masses, and a sum of £50 for the repair of the Barraduff chapel; but that he was in a difficulty as to these gifts of £50 and £60, since he did not know who was to succeed him as such parish priest.

At the request of Father O'Flaherty, O'Bryen then filled up request notes for deposit receipts for £60 and £50.

The request notes were in the following form :—

THE NATIONAL BANK, LIMITED, KILLARNEY.

15*th June*, 1905.

Wanted a Deposit Receipt in favour of the Parish Priest of Glenflesk and Barraduff for the sum of £50. Church.

(Signed) M. O'FLAHERTY, P.P., *Applicant.*

Entd. £50. C. P., *Teller.*

THE NATIONAL BANK, LIMITED, KILLARNEY.

15*th June*, 1905.

Wanted a Deposit Receipt in favour of the Parish Priest of Glenflesk and Barraduff for the sum of £60. Masses.

(Signed) MAURICE O'FLAHERTY, P.P., *Applicant.*

Entd. £60. C. P., *Teller.*

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The deposit receipts subsequently issued in pursuance of these request notes were in the following form :—

No. 43/74,114 DEPOSIT RECEIPT.

THE NATIONAL BANK, LIMITED,
KILLARNEY, *15th June*, 1905.

£60.

Received from the Parish Priest of Glenflesk and Barraduff the sum of £60 for Masses, to be accounted for at our office here.

For THE NATIONAL BANK, LIMITED.

The other was as follows :—

No. 43/74,507 DEPOSIT RECEIPT.

THE NATIONAL BANK, LIMITED,
KILLARNEY, *15th June*, 1905.

£50.

Received from the Parish Priest of Barraduff, for repairs and building to Church, the sum of Fifty Pounds sterling, to be accounted for at our office here.

For THE NATIONAL BANK, LIMITED,
W. F. O'BRYEN, *Manager*.

The rest of the £881, after deducting the £110, namely £771, was lodged on two deposit receipts of £385 each, one in the name of the Rev. Maurice O'Flaherty and Mary Griffin, and the other in the name of the Rev. Maurice O'Flaherty and Hannah Griffin.

Two days afterwards, Father O'Flaherty, being in need of money for his personal expenses, went to the bank at Killarney, drew out the £50 placed on deposit receipt for the repairs of the chapel, and lodged the amount to the credit of his current account, and this sum of money was from time to time spent.

On the 20th September, 1905, Mr. O'Bryen had a further interview with Father O'Flaherty at his residence, in the presence of Father Costelloe and Mary Griffin, as to a deposit receipt for the repair of Barraduff chapel. Father O'Flaherty said that he desired to leave £50 to his successor for the purpose, but on the suggestion of Father Costelloe he decided to increase the amount to £100. Accordingly, Mr. O'Bryen filled up a request for a deposit receipt bearing date the 21st September, 1905, in favour of

the parish priest of Barraduff for repairs and rebuilding of the church for £100. The deposit receipt for this sum of £100 was in exactly the same form as the former deposit receipt for £50, and the amount was made up by taking £50 from each of the deposit receipts of £385 lodged for the Misses Griffin. Fresh deposit receipts were then made out for £335 each for the Misses Griffin, and the amount was lodged in each case in the name of Father O'Flaherty and each of the nieces as before.

Father O'Flaherty died on the 15th of November, 1905, having previously made his will, dated the 22nd August, 1887, and administration with the will annexed was granted to Timothy O'Flaherty. The Rev. John Browne succeeded him as parish priest of Barraduff, and he claimed the two sums of £100 and £60 so lodged on deposit receipts. Timothy O'Flaherty, having issued a writ against the National Bank for the £160, the bank applied for an interpleader order, whereupon a consent order was made that the claimants' rights be determined on motion as if an originating summons in Chancery had been issued.

A. M. Sullivan, for the plaintiff.

D. F. Browne, K.C., and *James Reardon*, for the defendant.

The arguments were in substance the same as on the appeal, reported *infra*, pp. 428, 429.

LORD O'BRIEN, L.C.J.:—

This is not an uninteresting case. The question is whether a complete trust has been created with reference to the sums of £60 and £100—moneys which had belonged to the Rev. Maurice O'Flaherty. By complete trust I mean a binding irrevocable trust of what may be the subject-matter of a trust (moneys in this case) in the hands of a trustee. I do not mean the disposition of money in which he who is said to create a trust retains a beneficial interest in the subject-matter of the trust, or a power to revoke what he has done. I mean a binding complete disposition of money, irrevocable by the donor. Two things we must remember *in limine*—that a good trust may be declared by parol; and that a binding trust may be in favour of a volunteer—that

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is, in favour of a person who has not contributed any consideration for its creation. Now then, what are the facts of this case? A good priest, the Rev. Maurice O'Flaherty, being mindful of a future state, and being naturally anxious to give back to the Church some of the money he made by it, placed two sums in the hands of the manager of the National Bank at Killarney, under circumstances which are set forth in an affidavit made by that gentleman. I think it well to read the material passages of the affidavit—[His Lordship read the affidavit, which set out the facts as stated above].

Now, these are the facts, and, looking at them as a whole, I think they establish the creation of a binding trust—a trust of moneys in which the Rev. Mr. O'Flaherty retained no interest whatsoever—irrevocable by him. There are three important factors in the case—the conversations between the Rev. Maurice O'Flaherty and Mr. O'Bryen, the bank manager; the request note; and the deposit receipts. It is quite plain that the two sums of £60 for Masses and £100 for repairs and rebuilding of the church were, by the direction of the Rev. Mr. O'Flaherty, segregated by Mr. O'Bryen for the purposes indicated. These two sums were, with the consent of the bank manager, and by the direction of Rev. Maurice O'Flaherty, to await the appointment of his successor, and were then to be handed to him on demand that he might effectuate the charitable objects for which they were dedicated. The trust was a charitable trust; the trustee, until the person to administer the trust arrived, was the bank, and on the appointment of a successor to Father O'Flaherty the trust funds to which a charitable character was attached were to be handed over to him. The bank for the time being was the trustee—a trustee to keep, to preserve, but not to administer the fund. The bank manager accepted this position—he accepted either for himself or for the bank. If he could not accept it for the bank, he must be taken to accept it for himself. But I see no reason why he should not accept it for the bank. There was no suggestion whatever made on any occasion by Mr. O'Bryen why the bank could not or should not perform this function. On the contrary, Mr. O'Bryen, the bank manager, who represented the bank, dealt with the Rev. Maurice O'Flaherty on the basis that

there was nothing in the constitution of the bank or otherwise to prevent this being done.

It has been gravely argued that the request note showed, because the words "for the parish priest of Barraduff" were in it, that the money was lodged for the Rev. Maurice O'Flaherty himself.

I shall read the request notes as to the £60 and £100—[His Lordship read the request notes and the deposit receipts given in pursuance of them]. It is to be remarked that there is no Christian name mentioned in the request note for the £60, or in the one for the £100, though in the request notes for the other deposit receipts Christian names are given, not alone of others but of the Rev. Maurice O'Flaherty himself, and there is in the request note for the £60 the all-important word "Masses." Looking at the request note and the deposit receipt, this sum of £60 was plainly lodged for the successor of the Rev. Maurice O'Flaherty. The argument that the money for Masses was lodged for Father O'Flaherty himself, involved this rather fantastic suggestion—that the Rev. Maurice O'Flaherty might, by some extraordinary resurrectionary process, rise from the dead, and at the Chapel of Barraduff, in the county of Kerry, say in the flesh Masses for the repose of his soul, which was, for for the time being, in another world in a state of purgation for the sins—the venial transgressions—committed in this world. That, in fact, the reverend gentleman might arise in the flesh and leave his soul behind him. There is no warrant for this suggested segregation of animated body and suffering soul in any book of authority from the Year Books to the present day.

Mr. Daniel Browne, who brought to the argument of the case much spiritual warmth, emphatically repudiated this fantastic suggestion. It is plain that the money, impressed with a charitable trust, was segregated in the bank to be handed to Rev. Maurice O'Flaherty's successor when appointed. These moneys, the £100 as well as the £60, were clearly appropriated for a special purpose, for a legal charitable object. The sums so appropriated were accepted by the bank to be handed over to Father O'Flaherty's successor as the hand to effectuate the charitable object, and the deposit receipts were so framed. The successor of the Rev. Father

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O'Flaherty was to be treated as the depositor—the person who was to be deemed to have lodged, and as such conclusively entitled to draw, the money. The bank was trustee of the money, and the Rev. Maurice O'Flaherty and his representatives were trustee or trustees of the deposit receipts until a successor of the former was appointed. The function of the bank was to keep the money, and the function of the Rev. Father O'Flaherty and of his representatives was to preserve the deposit receipts for his successor.

Mr. Sullivan, in an able argument, pressed with much insistence that the fact that Mr. O'Bryen, the bank manager, at the Rev. Mr. O'Flaherty's request, placed the original £50 for the repair of the chapel of Barraduff to the credit of the general account of the Rev. Mr. O'Flaherty, showed that, though originally appropriated for a charitable purpose, its appropriation was not a final binding disposition, but was of a revocable character. I do not agree with this view. We must regard what was done. A binding complete trust was, in my opinion, created with reference to the £50 for the repair of Barraduff Church. It was a trust—a disposition good as against Father O'Flaherty and the bank manager. The request note and deposit receipt in relation to the £50 were not destroyed, and it might, perhaps, have been argued that what took place was a mere enlargement of the subject-matter of the trust, that money of a certain value was originally the subject-matter of the trust, and that money of greater value was made subject to the same trust. But, in my opinion, whatever was the true view with reference to the original £50 for the repairs of Barraduff, what took place with reference to the £100 created a complete, binding, irrevocable, charitable trust. It was most unequivocally intended to be a final disposition. It was then and there placed, segregated, for the purposes indicated. The intention at the moment so to segregate, and so to dedicate, was absolute. There was no reservation of any kind whatever—there was a perfect, complete disposition; and if there was any subsequent dealing of an inconsistent character, it would constitute a breach of trust. The disposition was not testamentary or intended to be testamentary; it was complete from the moment, though the application of the moneys was postponed until after the death of the

Rev. Maurice O'Flaherty. No previous breach of trust, if such was committed, could exonerate the bank from its accepted obligations with reference to the latter sum of £100.

The disposition of the £100 for the repairs of the church at Barraduff was a good charitable trust—a temporary trusteeship was created in the bank—the money was to be handed over to the Rev. Maurice O'Flaherty's successor when appointed, and was to be applied by him for the indicated charitable purposes when he received the money. Taking, as I have said, the conversation between Mr. O'Bryen and the Rev. Maurice O'Flaherty, the request note, the lodgment of the £60, and the appropriation of the £100, and the deposit receipts, I think that a complete irrevocable trust was created in an appropriate effectual way. By agreement of the bank manager and the late parish priest, the money was to be held by the former for the purposes indicated. The request note as well as the actual language used—language in writing as well as by parol—written as well as spoken—and the peculiar form of the deposit receipt—all taken together clearly show that a segregated sum which the bank manager was to hold for the time being was impressed with a complete, binding, irrevocable, charitable trust, to be held by a trustee, the bank, until the time for its administration arrived, namely, the appointment of a successor to the Rev. Maurice O'Flaherty, when it was to be paid to the former as the hand to administer the respective funds, on presentation by him of the appropriate deposit receipt in which beyond all question he, and not the Rev. Maurice O'Flaherty, was described—not by Christian and surname, but by adequate description.

On the whole case I think the intention of the donor at the moment of disposition was absolute, and that the disposition by him was complete and irrevocable. It will be perceived that I have cited no cases. I have referred to what I believe to be principles applicable to the subject-matter, and I add as a concluding sentence of my judgment that I think the many cases to be found in the books show that subtle distinctions have been allowed to go sufficiently far in defeating the intention of the owners of property.

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JOHNSON, J.:—

This case is very near the border-line; but I think that in the real nature of the transaction, and the acts and declarations of the Rev. Maurice O'Flaherty, parish priest of Glenflesk and Barraduff, there is a sufficient parol declaration of trust of the two charitable gifts, or what is equivalent to a declaration of trust; and being of money only it is good by parol, and is not within the Statute of Frauds, and not required to be in writing. In about a fortnight after Father O'Flaherty had withdrawn all his money from the bank, Mr. O'Bryen (the bank-manager) waited upon him at his residence, and pointed out the folly of keeping all his money locked up in boxes in his house. Father O'Flaherty, in reply, said he did not wish to make a will, but would leave all his money, free of expense, to his two nieces, and accordingly he handed Mr. O'Bryen £772 for his two nieces in equal shares, and two deposit receipts, each in the name of the Rev. Maurice O'Flaherty and that of his niece, were issued without reference to his parochial office. On the same occasion Father O'Flaherty said he wished to leave to his successor, as parish priest of his parish, £60 for Masses, and £50 for the repairs of his church, but was in a difficulty as to these gifts because he did not know who was to succeed him as such parish priest, and he segregated from his money two specific sums, viz., said sum of £50 and said sum of £60, for these two charitable objects, and handed these two specific sums to Mr. O'Bryen, who received them for these two charitable purposes, and issued two deposit receipts, read by the Lord Chief Justice—that for £60 marked for Masses, and that for £50 for repairs of the church.

When Father O'Flaherty segregated these two sums for these two charitable gifts, and handed them to Mr. O'Bryen, who accepted them for these several purposes for which Father O'Flaherty had said he wished to leave them to his successor as parish priest, the gifts by parol were complete and irrevocable, and not affected by the deposit receipts issued in the parochial title of Father O'Flaherty, which evidenced the transaction constituted by the parol gift; and Mr. O'Bryen held the two sums of money on the charitable trusts to which Father O'Flaherty had appropriated and completely dedicated them. In the following September,

Mr. O'Bryen again visited Father O'Flaherty—Miss Griffin, one of his nieces, was present. The Rev. Mr. Costelloe suggested to Father O'Flaherty, that as he got his money from his parishioners, he ought to increase his gift of £50 for the repairs of Barraduff Church to £100, and Father O'Flaherty decided to do so. His money was not then, as it was on the former occasion, in his house—it was in the bank, on the deposit receipts of the Rev. Maurice O'Flaherty and his nieces. It was, therefore, impossible for him to hand it to Mr. O'Bryen as he had handed him the former £50; but he did the next best and only thing in his power by appropriating to his charitable gift £100 of the money on the deposit receipts in his own and his nieces' names, and accordingly Mr. O'Bryen, presumably by the authority and direction of Father O'Flaherty, deducted £50 out of each of these two receipts (making up the £100) for the repairs and rebuilding of the church, and of that gift the deposit receipt of the 21st September, 1905, read by the Chief Justice, was the evidence; the gift itself being constituted by the statements of Father O'Flaherty; the appropriation and segregation of the £100 for the same object as the previous £50 (which was then placed to Father O'Flaherty's bank current account) had been given.

I do not think the substitution of £50 of the £100 in place of the original trust £50 (though irregular) affects the matter, because the £50 of the £100 was (in the event) impressed with the same charitable trust as the original £50.

BOYD, J.:—

I am of the same opinion. I think it perfectly plain that if the reverend gentleman had handed over these two sums to a private individual, saying, "I give you this sum for the purpose of Masses, and this other sum for the purpose of repairs of the parish church," a perfectly good trust would have been imposed on the person receiving the moneys. How does the present case differ from this? Merely in that the bank got from their manager the moneys which had been given to him by the Rev. Mr. O'Flaherty, and gave the latter deposit receipts for the same, which were retained by him. Once a trust was created I do not

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think that the retaining of the deposit receipts by Father O'Flaherty made any difference. As to the sum for Masses, it was impossible, as has been pointed out by my Lord Chief Justice, that the reverend gentleman could have said the Masses for himself. This must be done by a third party after his death, and the £60 was deposited for this express purpose.

As to both sums, that for Masses, and that for the repairs of the church, the intention of the Rev. Mr. O'Flaherty was perfectly clear. The only question is, Has he given effect to his intentions in a legal and binding manner? I concur in the judgment of the Court that he has.

WRIGHT, J.:—

I agree in the conclusion at which the Court has arrived, though my mind is not altogether free from doubt. The facts are plain and uncontroverted. There is no doubt whatsoever as to what was the intention of the Rev. Mr. O'Flaherty. It was that these moneys were to be held during his lifetime, and after his death were to go to the parish priest of Glenflesk and Barraduff, to be applied by him, as to the £60, for Masses, and as to the £100, for the repairs and re-building of the parish church. The case assumed several aspects during the hearing. At first it was argued that there was a *donatio mortis causa* of these sums. Of course, this contention was hopeless, and was abandoned. Mr. Browne contends that the transaction amounted to the creation of an irrevocable trust. It is as to the word "irrevocable" that I have the difficulty.

The reverend gentleman had in the house a sum of £882. He lodged on deposit receipt a sum of £386 in the joint names of himself and a Miss Mary Griffin, a niece of his, and lodged another sum of the same amount in the joint names of himself and another niece, clearly showing that in the event of his death, which was likely to occur soon, the nieces were to take these respective amounts by virtue of survivorship. As regards the other sums the following procedure was adopted :—The Rev. Mr. O'Flaherty filled up two request notes, showing clearly the intention in his mind. These request notes are as follows:—[His Lordship read

the request notes of 15th June, 1905, for the deposit receipts of £60 and £50.] These two sums of £60 and £50 were handed over by Father O'Flaherty to the bank manager, and deposit receipts for the same were drawn up in the following form:—[His Lordship read the deposit receipts.] These receipts were handed to Father O'Flaherty.

The meaning was this—These two sums were given to the bank manager to be accounted for in a particular way, viz., on the death of Father O'Flaherty to be handed over to the person who should then fill the office of parish priest of Glenflesk and Barraduff, and the purposes for which they were to be applied by such person were indicated.

The doubt in my mind arises from what took place subsequently with reference to the £50. It is not strictly accurate to say that what occurred was simply increasing the £50 to £100. The £50 was lodged on the 15th June. Two or three days afterwards the reverend gentleman appears to have changed his mind, for, as appears by the bank account, he drew out this £50 which had been earmarked as for the repairs and re-building of the church, and lodged the sum to his current account. The bank manager, rightly or wrongly, treated him as having control over the money. Afterwards, on the 21st September of the same year, in consequence of a conversation between Father O'Flaherty, his curate, and the bank manager, Father O'Flaherty decided to deposit a new sum of £100 for the same objects for which the £50 had been deposited, viz., the repairs and re-building of the church. A request note was filled up, and a deposit receipt obtained in the same forms as those with respect to the £50.

With some doubt, therefore, but certainly without any regret, I concur in the judgment of the Court that a good charitable trust was created with respect to the sums in question.

J. G. T.

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The plaintiff appealed (1).

A. M. Sullivan (with him *J. F. Moriarty, K.C.*), for the appellant: This is not a valid declaration of trust. There may be a good parol declaration of trust of personal property: *Paterson* v. *Murphy* (2); but in order to constitute a good voluntary trust there must either be a clear declaration of trust by the donor, or a complete assignment of the property: *Milroy* v. *Lord* (3); *Warriner* v. *Rogers* (4); *Richards* v. *Delbridge* (5). But in this case the Rev. Maurice O'Flaherty was the owner of this property down to his death; he could have sued the bank for it; and the bank held it for him. Moreover, the acts of the parties showed that he was regarded as the owner of the money during his life: *Breton* v. *Woollven* (6). It was, at most, an attempt to effect a disposition of property to become operative on his death; that does not constitute a complete gift enforceable in equity: *Gason* v. *Rich* (7).

D. F. Browne, K.C., and *James Rearden*, for the respondent:—

A valid charitable trust was declared by Father O'Flaherty, with respect to the money handed by him to the bank manager, for which deposit receipts were subsequently issued. There was no uncertainty as to the purposes. The request notes prepared by the bank manager, by the direction of Father O'Flaherty, and also the deposit receipts, expressly state the purposes. There was a clear intention to create a charitable trust, and an effectual trust was declared *inter vivos*: *Moore* v. *Darton* (8). There being an effectual declaration of trust, it was irrevocable: 2 Wh. and Tud. L. C. (7th ed.), p. 863. The bank, through their manager, had notice of the trusts: *Collinson* v. *Lister* (9); Hart on Bankers, p. 449. The bank had notice that the person to be paid the money was the successor of Father O'Flaherty in the Parish of Glenflesk. As regards the deposit receipt for Masses, it is clear

(1) In the Court of Appeal, before SIR SAMUEL WALKER, C., and FITZGIBBON and HOLMES, L.JJ.
(2) 11 Hare, 88.
(3) 4 D. F. & J. 264.
(4) L. R. 16 Eq. 340.
(5) L. R. 18 Eq. 11.
(6) 17 Ch. D. 416.
(7) 19 L. R. Ir. 391.
(8) 4 De G. & Sm. 517.
(9) 7 De G. M. & G. 637.

from the nature of the trust that the money was to be paid to the successor. The person to be paid could not then be named, as a successor to Father O'Flaherty had not then been appointed, but the person to be paid was designated by the office which he would hold when the trusts became operative. The deposit receipts could legally be paid only to Father O'Flaherty's successor. The fact that the deposit receipts were in Father O'Flaherty's possession at the time of his death does not affect the validity of the trust: *Fletcher* v. *Fletcher* (1); *Bills* v. *Tatham* (2). The fact that the application of the money was postponed until after the death of Father O'Flaherty does not affect the validity of the trust: Tudor on Charities (4th ed.), p. 103.

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SIR SAMUEL WALKER, C. :—

We have considered this case during the argument, and during the adjournment since yesterday, and on the evidence and documents, as an inference of fact, we have come to the conclusion that the decision of the King's Bench cannot be sustained. All the judges in the King's Bench—except the Lord Chief Justice—treated this case as one of great doubt. Johnson, J., said it was "very near the border-line." I do not agree with that; in my opinion this case is not on the border-line; it goes beyond it.

The contest is between Timothy O'Flaherty, as administrator with the will annexed of the Rev. Maurice O'Flaherty, against the Rev. John Browne, the successor of the latter as parish priest of Barraduff, as to the right to two sums of money lodged on deposit receipts with the National Bank, by the Rev. Maurice O'Flaherty, one of the deposit receipts for £60 being dated the 15th June, 1905, and the other for £100, being dated the 21st September, 1905. It appears that on the 30th May, 1905, all the cash belonging to the reverend gentleman, amounting to £881, was withdrawn from the bank, and handed over to his niece, Miss Griffin, and the Rev. Michael Costelloe. Then there was an interview on the 15th June between Father O'Flaherty and the bank manager, when the latter told him that

(1) 4 Hare, 67, 79. (2) [1891] 1 Ch. 82.

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it was unwise to have the money lying about the house. He replied that he did not wish to make a will, and he added that it was his wish to leave to his successor as parish priest of the said parish a sum of £60 for Masses, and a sum of £50 for the repair of the Barraduff chapel; but that he was in a difficulty as to these gifts of £50 and £60, since he did not know who was to succeed him as such parish priest. He did not want to make a will, but he wished his property to pass the same as if he did, but by a different form. Accordingly, to carry out his wish, at the request of Father O'Flaherty, the bank manager filled up a request for two deposit receipts, one for £60 for Masses, and the other for £50 for repairs of the church. The deposit receipts are both in the same form :—

> "Received from the Parish Priest of Glenflesk and Barraduff the sum of £60 sterling for Masses, to be accounted for at our office here.
>
> "*For* The National Bank, Limited."

The other, for £50 for the repairs of the church, was in similar terms. He also handed him the balance of his money, £772, which he lodged on two deposit receipts of £386 each, in the joint names of the Rev. Maurice O'Flaherty and each of his two nieces. A few days afterwards one of these deposit receipts, the £50 for repairs of the church, was withdrawn, and the amount of it was placed to the credit of his current account, and spent by degrees.

There was a further interview on the 20th September, 1905, between the Rev. Maurice O'Flaherty and the bank manager, in the presence of the Rev. Michael Costelloe, the curate. Father O'Flaherty stated that he wished to leave £50 to his successor for the repairs of the chapel. The curate remarked that he had got £50 or £60 from his parishioners, and suggested that he should make it £100. Accordingly he took £50 from each of the nieces, and he made a new deposit for £100 for the parish priest of Barraduff, for repairs and building of the church. The money was lodged in the bank in the same manner as the former deposit receipts. He thus increased the gift for the repairs of the chapel from £50 to £100, and he appropriated the difference from the two nieces. He died on the 15th November, 1905.

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Under these circumstances what other conclusion can we draw from the facts than that this money remained the property of the Rev. Mr. O'Flaherty ? First, on the form of the deposit receipts themselves, these sums were lodged in his name, as parish priest of Barraduff, which he then was. At that date, on the face of the deposit receipt, the money belonged to him and no one else. He exercised proprietary rights over it, by taking up the money lodged upon one of the deposit receipts, showing that he wished to retain control over it.

As regards the two sums in question the transaction starts with the assumption that the reverend gentleman could not touch one penny of the two deposit receipts when lodged. That is contrary to the facts, and to the acts of the parties. We asked over and over again, who was the owner of the money during the Rev. Mr. O'Flaherty's life. The only answer I can give to that is the man in whose name it was. He could sue for it at any moment he liked. Supposing a successor as parish priest had been appointed during Mr. O'Flaherty's life, whose would the money be then ? We received no answer to that. There was no consideration given for the money.

Then we asked who was to be the trustee. Mr. Browne said the bank. How can a manager of a branch of the bank make the bank a trustee ? But independently of that difficulty, it is contrary to the terms of the deposit receipts which the bank issued. According to Mr. Browne, the bank was guilty of a breach of trust in cashing the deposit receipt for £50.

Is the successor of the Rev. Mr. O'Flaherty as parish priest to be the trustee ? He was not in existence; and he was not named.

In my opinion, the entire facts of the case show at most an intention on the part of the reverend gentleman to effect a disposition to become operative only at his death, and the principle laid down by the Court of Appeal in *Gason* v. *Rich* (1) governs this case, that once there is a testamentary intention, and not an immediate gift, there is not a trust enforceable in equity.

(1) 19 L. R. Ir. 391.

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I am therefore of opinion that the appeal should be allowed, and that the decision of the King's Bench, holding this to be a good voluntary trust, should be reversed.

FitzGibbon, L.J.:—

I find it impossible to support the judgment under appeal, on the law as I understand it, or on my view of the facts. I propose to deal with the facts first, and if I am right as to them, I think the legal conclusion is clear. Having regard to the dealings with the sums of £100 and £60 in question, and with the other money of the Rev. Mr. O'Flaherty, and to the form of the deposit receipts, I have no shadow of doubt, on the evidence of the bank manager, that in fact and in law, and according to the intention and understanding of the parties, the depositor was the owner of the money, and retained the power of dealing with it in his own hands so long as he lived. It was his money, standing in his name, and in every dealing with it the manager treated him as entitled to dispose of it. The relation between the bank and Mr. O'Flaherty was that of debtor and creditor, and of banker and customer, regulated by the terms of a written contract, evidenced by the deposit receipts and the conditions endorsed thereon, which are quite inconsistent with the disability of the depositor to draw the money when he pleased. It is admitted that the Rev. Mr. O'Flaherty, who lodged the money, kept the receipts until his death. Can he have been the owner of the receipts and not of the money which they represented? If he was not the owner, who was?

The Lord Chief Justice says:—

> "These moneys—the £100 as well as the £60—were clearly appropriated for a special purpose, for a legal charitable object. The sums so appropriated were accepted by the bank to be handed over to Father O'Flaherty's successor as the hand to effectuate the charitable object, and the deposit receipts were so framed. The successor of the Rev. Father O'Flaherty was to be treated as the depositor—the person who was to be deemed to have lodged, and as such conclusively entitled to draw the money. The bank was trustee of the money, and the Rev. Maurice O'Flaherty and his representatives were trustee or trustees of the deposit receipts until a successor of the former was appointed. The function of the bank was to keep the money, and the function of the

Rev. Father O'Flaherty and of his representatives was to preserve the deposit receipts for his successor."

With all respect, I cannot accept this as the result of the evidence, so long as Father O'Flaherty lived. As to the £100 deposited for the repairs of the church, there is no foundation for saying that the successor was to be deemed to have lodged the money, that posthumous repairs only were contemplated, and that if the roof had been blown off the church in Father O'Flaherty's lifetime, and he wanted to draw the money to repair it, the function of the bank was to keep the money, not only until he died, but until a successor was appointed, who thereupon would become entitled to draw it to pay for repairs afterwards.

Similarly as to the deposit receipt for the Masses. Could not the depositor, during his life, alter the mode in which his object was to be carried out? Could he not have had the Masses said in some other church? The Lord Chief Justice spoke of "some extraordinary resurrectionary process" as being involved in the suggestion that Father O'Flaherty could draw the money. But the decision under appeal involves the prenatal ownership of a hypothetical depositor—of a successor who may never be appointed, and it makes Father O'Flaherty's money *bona vacantia*, not only during his own life, but also after his death, until a parish priest is appointed in his place. What was to happen if he had been promoted to another parish, or had vacated his cure otherwise than by death, or had been succeeded by an administrator? These questions show the impossibility of holding that a "complete, binding, irrevocable trust" was created as to these two sums of money. That view cannot be reconciled either with the dealings of the parties, or with their relations to each other, and the inevitable conclusion is that of the Lord Chancellor, viz. that this transaction was, in effect, an attempt to make a nuncupative testamentary disposition. Father O'Flaherty remained the owner during his life of money which, on his death, he wished to pass to his successor, just as he intended, in the case of his nieces, that the money which he intended for them should go by survivorship.

The Lord Chief Justice relied on principles which he believed

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to be applicable to the subject-matter, but he cited no cases. There are two principles applicable to the subject-matter, of which one or other appears to be fatal to the respondent's contention. The first is that a testamentary disposition can only be made by will, and that any attempt to make it by parol *inter vivos* must fail. The other is exemplified in *Richards* v. *Delbridge* (1). A voluntary trust may be created by a declaration of trust, or by a complete assignment of the legal ownership to a trustee; but it is impossible to turn an incomplete, conditional, or postponed gift into a trust, where there is no intention to create the relationship of trustee and *cestui que trust*. It was not intended that this money should be left derelict, or that any trust should take effect upon it, during the life of Father O'Flaherty. So long as he lived, he was owner, and nothing less. Mr. Browne seemed puzzled when I asked whether Father O'Flaherty, if he had lived for ten years after lodging the £160, and had brought the receipts to the bank and had required to draw the interest and re-lodge the principal, either with or without the interest, would he have been entitled to do so? Mr. Browne had to answer that he would not; that the parol trust was to last for the depositor's life, and was irrevocable by him.

This is one of the many cases in which a man has tried to pass his property to another when he dies, but not until then, otherwise than as the law allows. In my opinion, these dealings did not create a trust, and could not operate as a testamentary disposition.

As to costs, I do not think that it was competent to give the costs of the litigation about the £160 out of the general assets of the testator, which belong to other parties, and they must be paid by the unsuccessful claimant who began the litigation.

HOLMES, L.J.:—

The Lord Chief Justice begins his judgment by laying down the proposition that a good trust of personalty may be made by parol. But, in this case before us, no conversation or words sufficient to create a trust have been deposed to. To ascertain

(1) L. R. 18 Eq. 11.

the intention of Father O'Flaherty, we must have regard to what was done as well as to what was said. In a case like this, authorities are of little assistance; and the Lord Chief Justice cited none. The facts are few and simple. A parish priest went to the bank, and drew out all his money, amounting to about £880. The manager, some time after, paid him a visit, when he pointed out to him that it was a dangerous thing to keep, in a country-house, a large sum of money without protection. Then followed a conversation out of which this transaction arose. The reverend gentleman said, in effect: "I don't want to make a will, but I wish my property to go in a certain way after my death. I desire to leave £60 for Masses to my successor as parish priest, £50 in the same way for repairs of the chapel, and to give the balance to my two nieces." The natural inference seems to me to be that he desired to substitute for a will some plan which, like a will, would give him full control over his property during his life. The mode suggested by the bank manager was four deposit receipts, two of them being for £386 each, of which the depositors named were the priest and one of the nieces. We have not seen these documents, but I presume that they would be payable to the survivor. I doubt not, however, that the reverend gentleman expected that, if he wanted this money, or any part of it, before his death, the nieces would join with him in obtaining it; and this actually happened to the extent of £100. The other two deposit receipts, one for £60 expressed to be for Masses, the other for £50 for the repairs of the church, were in the name of the parish priest of Glenflesk and Barraduff—the description of Father O'Flaherty himself. But it has been argued that he is not the person thus indicated, that it means his successor in the office; but how is this consistent with his drawing out the £50 for repairs of the chapel two days after the lodgment, and placing the amount to the credit of his current account, against which he drew cheques for his private purposes from time to time? How then it can be contended that this sum of money could not be touched by the gentleman who lodged it, I cannot understand. I asked during the argument who was the trustee, and no satisfactory reply was given. I suppose, however, it must have been either the depositor or the bank: but I cannot assume that both

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priest and banker joined immediately after the deposit in committing a manifest breach of trust. An argument has been founded on the words "for Masses" in the £60 receipt; but I can draw no distinction between the two sums of £60 and £100. If the priest was to continue to have control over the one, he must have been in the same position to the other. For these reasons, I hold that the priest retained the beneficial ownership of the £60 and £100, as fully after the deposit as he did before.

Solicitor for the plaintiff: *Joseph Mangan.*
Solicitor for the defendant: *James Egan.*

R. D. M.

DEVLIN *v.* CORPORATION OF BELFAST (1).

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1907.
Feb. 7, 20.
Appeal.
April 21, 22.
May 17.

Negligence—Personal injuries—Accident to bystander through collision of two vehicles—Proximate and effective cause—Findings of jury, how far inconclusive—New trial.

The Falls Road, one of the principal streets leading out of Belfast to the west, and along which the electric tramway passes, is intersected at right angles by Northumberland Street and Albert Street. Q. was driving a horse and trap along Northumberland Street, intending to cross the Falls Road into Albert Street. A tramcar coming down Falls Road collided with the trap, and caused it to swerve round. Q. was thrown out and struck the plaintiff, who was standing on the pavement, and had in no way contributed to the accident. In an action against the defendants, as owners of the tramways, the jury found—(1) that Q.'s trap was negligently driven on the day of the accident; (2) they were unable to agree as to whether the motorman was negligent in driving and managing his car. A third question was put to them—(3) "If there was negligence on the part both of Q. and the motorman, was the real and effective cause of the collision (*a*) the negligence of Q.? or (*b*) the negligence of the motorman?" The jury answered—3 (*a*) "Yes," and 3 (*b*) "No." The Judge entered judgment for the defendants.

On a motion for a new trial :—

Held, by the Court of King's Bench, that the findings of the jury attributed the entire blame in relation to the accident to Q., and that the Judge was therefore right in entering judgment for the defendants.

Held, by the majority of the Court of Appeal (Sir Samuel Walker, C., and FitzGibbon, L.J.; *dissentiente* Holmes, L.J.), that the findings of the jury, read with their disagreement on question 2, did not supply all the materials necessary for finally determining the questions in dispute, and that, to relieve the defendants from liability, it was not enough to show that Q. was guilty of negligence directly causing the injury, but that the plaintiff was entitled to a verdict against the defendants if the motorman could, by reasonable skill and care, have avoided the collision; and, that inasmuch as this question was not left to the jury, although so required by plaintiff's counsel, there must be a new trial.

(1) In the King's Bench Division, before LORD O'BRIEN, L.C.J., and BOYD and WRIGHT, JJ.

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ACTION by Anne Devlin against the defendants, as owners of the Belfast Tramways, for damages for negligence in the management of a tramcar, which collided with a horse and trap belonging to one Quee, in consequence of which Quee was thrown out of the trap, fell on the plaintiff, and injured her.

The tramcar was proceeding along the Falls Road, one of the principal streets leading out of Belfast towards the west, and had nearly arrived at a point where the Falls Road is intersected at right angles by two streets—Northumberland Street on the north side and Albert Street on the South. The width of Falls Road is 32·7 feet from kerb to kerb, and 57·3 feet from buildings to buildings. The width of Northumberland Street is 24·3 feet from kerb to kerb. There were buildings on both sides of the street. The plaintiff was proceeding up the Falls Road between 10 and 11 o'clock, a.m., on the 7th April, 1906, and was walking on the pavement; the tramcar of the defendants was coming along Falls Road, when Quee, who was driving down Northumberland Street, crossed the Falls Road in front of the tramcar. The horse and the main portion of the trap got safely across in front of the tramcar, but the tramcar struck the end of the trap, and turned it round, with the result that Quee was thrown out of the trap and fell on the plaintiff, who was seriously injured. Quee could not see the tramcar until just when he emerged into Falls Road. There was a conflict of evidence as to the speed at which Quee was driving: the witnesses for the plaintiff all swore that he was driving at a moderate speed, but some of the defendants' witnesses swore that he was driving very rapidly. The tramcar was going about seven or eight miles an hour; and the driver put on the brakes, and brought the car to a stand-still about three yards after the collision. The driver stated that he sounded his gong, and the conductor and a passenger on the tramcar stated that they heard it; but the plaintiff's witnesses—and a policeman who was on duty at the place—denied having heard the gong. The case had been tried previously by Gibson, J., who left to the jury the one question, whether the defendants were guilty of negligence causing the injury; and the jury were unable to agree.

The present trial took place before Kenny, J., and a special jury, at the Ulster Winter Assizes, on the 19th and 20th December, 1906.

The following were the questions left by the Judge to the jury, and the answers given to them :—

1. Was Quee's trap negligently driven by him on the day in question? Yes.

2. Was the motorman negligent in the driving and management of his car? Cannot agree.

3. If there was negligence on the part both of Quee and the motorman, was the real and effective cause of the collision—(*a*) The negligence of Quee? Yes. Or (*b*) the negligence of the motorman? No.

The jury assessed the damages at £75.

Chambers, K.C., for the plaintiff, asked the Judge to put an additional question to the jury—viz., Whether the accident was caused by the combined negligence of the driver of the trap and the motorman? The Judge declined, inasmuch as he considered that the replies to the questions he had formulated would be sufficient to try the case. After the jury had retired *Chambers, K.C.*, asked the learned Judge to tell them that if the motorman could have applied the brakes in time to avoid the accident, the omission to do so was its real and effective cause. Kenny, J., refused to do so, on the ground that he had already sufficiently instructed them.

On the findings of the jury the Judge entered judgment for the defendants.

The plaintiff moved for a new trial.

James Chambers, K.C., and *T. J. Campbell*, for the plaintiff.

John Gordon, K.C., *R. F. Harrison, K.C.*, and *T. Harrison* for the defendants.

LORD O'BRIEN, L.C.J. :—

Feb. 20.

The question we have to determine in this case is a very short one, not unattended with some difficulty. It is, What is the effect of what the jury did find, having regard to the fact that they did not agree on one question put to them? Mr. Chambers, for the plaintiff, in a clear argument, maintains that the case remains untried, and that it must be submitted to another jury. The

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facts are few, comprised in the narrowest compass. The plaintiff brought an action against the Belfast Corporation, which is the proprietor of the tram system in that city, to recover damages for personal injuries alleged to have been incurred by the negligence of the motorman of the tram in driving against a certain horse and trap, the driver of which, it was alleged, was thereby propelled against her and knocked her down.

The controversy was this :—There were in the case the plaintiff, the tram, and the trap. The case of the tram was that it was in no default whatsoever—that it was the trap that was wholly and *solely* to blame, that it ran into the tram, that the driver of the trap was thrown off by the tram and propelled against the plaintiff and caused the injuries complained of. "No," said the plaintiff, "both you and the trap were to blame; your combined negligence was the proximate cause of my being knocked down, and that being so, I can choose which I will sue." Now, there is no doubt that if there was joint negligence which was the immediate effective cause of the injury complained of, the plaintiff might select either offender. The law will not apportion responsibility if each directly and effectively contributed to the accident. This is not denied. But the question is here, Was not the negligence of the trap, having regard to the findings of the jury, the sole and exclusive proximate, effective cause of the accident? There is no question of law in the case—it is merely a question of the construction of the findings.

Now then, what were the questions put to the jury, what were their findings, and what questions did they leave unanswered? They are as follows :—

1. Was Quee's trap negligently driven by him on the day in question? Yes.

2. Was the motorman negligent in the driving and management of his car? Cannot agree.

3. If there was negligence on the part of both Quee and the motorman, was the real and effective cause of the collision—(*a*) The negligence of Quee? Yes. Or (*b*) The negligence of the motorman? No.

4. Assess damages. £75.

Having regard to the non-agreement of the jury on the second

question, I asked my brother Kenny to give us a more detailed description of his summing up. He wrote to me as follows:— [His Lordship read the letter (1).] This is his letter. I fear it does not throw any additional light on the subject. I will deal with the report as it originally stood. It will be seen that the second question is left unanswered. Does the fact of the second question being left unanswered, the jury having disagreed in reference to it, render the trial abortive. That is what Mr. Chambers so emphatically insisted upon. My answer to that is, I think not, having regard to the answers to the third question. Now, having regard to the third question, and the answer given to that question in both its branches, I think the question upon which the jury disagreed must be taken to have been dealt with by the jury, as if question 2 was limited to this:—Was there any failure of judgment or want of skill *at all* on the part of the motorman? was there any default at all on the part of the motorman? any want of judgment or skill, irrespective of the consideration whether that want of judgment or skill contributed as a proximate cause to the happening of the accident? I think the jury dealt with question 2 in this way having regard, as I said, to the answer to the third question. Of course, if there was an operative negligence on the part of the tram, that

(1) In reply to your queries:—

1. I did not, as stated in my report, put a question to the jury as to joint negligence; but I charged them as to the possibility of there being negligence on both sides.

2. I charged them in the direction of the negligence of the driver of the trap being the *proximate* cause of the injury.

3. I told them it was open to them on the evidence to come to the conclusion that there was negligence on the part of the driver of the trap and of the motorman; but I rather suggested that, in the case of the latter, whatever negligence there might be was more in the nature of an error of judgment in not applying his brakes earlier. But then came the question of proximate cause; and I put it to them—"Who is really to blame for the occurrence?" "Whose negligence was the proximate, real, immediate, and effective cause of the collision?" and I told them to consider that question on the assumption that both parties were negligent, but in wholly different degrees; and I told them that if either party could have avoided the consequences and effects of the other's negligence, the former would have been guilty of the proximate and effective negligence that caused the collision.

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negligence would be a joint effective cause of the accident—that is to say, if negligence both on the part of tram and trap produced the collision between them, which in any way resulted in injury to the plaintiff, either or both could be sued. This is elementary. The question really is, What do the findings mean? The answers to (*a*) and (*b*) in the third question must be read together: (*a*) says that the trap's negligence was the real effective cause of the accident; (*b*) in effect says, *so far as the accident was concerned, there was no reality in the contention that the tram in any way caused it.* I read this then as a finding of the jury that the *sole*, the exclusive, effective cause of the accident was the negligence of the driver of the trap. Accordingly, the verdict and judgment entered for the defendants must stand, and the motion must be refused with costs.

BOYD, J.:—

I entirely agree, and I only desire to add a few words to the judgment of the Lord Chief Justice. The jury disagreed upon the second question: "Was the motorman negligent in the driving and management of his car?" but they have found in answer to the third question that the real and effective cause of the collision was not the negligence of the motorman. Had the jury found "No" in answer to the second question, there would be nothing to be argued in the case; but having disagreed we are bound to assume that some of the jury thought that the motorman was negligent. I think it is material to consider whether the plaintiff, upon whom lay the onus of proving negligence on the part of the defendants, discharged that onus. In this connexion I desire to refer to an observation of Mr. Justice Willes, one of the greatest Irishmen that ever adorned the English Bench, in *Daniel* v. *The Metropolitan Railway Company* (1):—"I agree entirely with counsel for the defendants that it is not enough for the plaintiff to show that there has been an accident on their line, and thence to argue that, therefore, the company are liable, even *primâ facie*. It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is reason-

(1) L. R. 3 C. P. 216 at p. 222.

able probability that the accident resulted from the want of some precaution which the defendants might and ought to have resorted to; and I go further, and say that the plaintiff should also show, with reasonable certainty, what particular precaution ought to have been taken." I have looked through the evidence, and I cannot regard the evidence of the four witnesses who were examined for the plaintiff, and who were standing at the corner when the accident occurred, as fixing any responsibility for the accident upon the defendants. On the part of the defendants it was proved by independent evidence—the evidence of passengers on the tram car, and the evidence of a policeman—that everything that could reasonably be done by the defendants was done by them; and that the default was altogether with the driver of the trap. It is not even alleged that the tram was travelling at an exceptionally high rate of speed. The tram was coming along Falls Road, and the trap was approaching in Northumberland Street, which is at right angles to the Falls Road. It should have been known to anybody driving in Northumberland Street that trams would be passing along the Falls Road; but the driver of the trap took no precaution whatever to avoid a collision with the tram, and he did not even slacken his speed. The evidence on behalf of the defendants also showed that when approaching the crossing at Northumberland Street the gong of the tramcar was sounded, the brakes were put on, as was proved by a man who was in the tram, and it was proved that within 3 or 4 yards of where the accident occurred the tram was brought to a dead stand-still. It could not have been going at a very excessive speed if it could be brought to a stand-still in 3 or 4 yards. Here is what Constable Corbell swore: "I saw the pony trap in Northumberland Street, 30 or 40 yards from where I was. I also saw tram coming down about same distance from me. I saw that if some one of them did not pull up there was sure to be a collision. At that time they could not see each other. I stepped out on footpath, and put out my two hands like that against Quee. He could see me. He took no notice. He was coming at an ordinary trot; not a furious pace at all. He made no change. Went straight across road. Tram was coming at a moderate speed. I observed tram being pulled up. Before the accident there was an

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effort made to stop the tram. Tram went 3 or 4 yards after collision. It was almost stopped when the collision took place." I would go so far as to say that even if the jury had given the answer "Yes" to the second question there would not have been sufficient in the evidence given by the plaintiff's witnesses to maintain that verdict. No doubt this woman was lawfully on the footway, and she was injured by the negligence of somebody, but the question is whose negligence was the effective cause of the injury. On this point I would like to refer to the case of *McDowall* v. *The Great Western Railway Company* (1). That was a case in which the defendants left some waggons standing on a siding, with an incline running down to a level crossing over the railway. There was a catch-point, which if the waggons had been placed inside it would have prevented any injury from taking place; but they did not place them inside it, relying on the brakes, which they screwed down. Some mischievous boys took off the brakes, and the waggons ran down the siding, and injured the plaintiff on the level crossing. Several questions were left to the jury by Mr. Justice Kennedy, and the jury found that the railway company were negligent in placing the waggons where they were placed. Mr. Justice Kennedy held that the plaintiff was entitled to maintain his verdict; but the Court of Appeal reversed his decision, holding that the evidence did not support the finding of negligence on the part of the defendants. Lord Justice Vaughan Williams says (at page 336 of the report):—"The suggestion made by the learned counsel for the plaintiff seems to be that the defendants might have put the van the other side of the catch-point, and then it could not have gone down the incline. But it is not true to say absolutely that if the defendants had done so it could not have gone down the incline; and it is not true to say that upon the other side of the catch-point it would have been safe. The truth of the matter is that, if it had been placed there, all these boys would have had to do was to open, or close, as the case might be, this catch-point and let the van go by, which would have been a very much simpler operation than that they went through when they got

(1) [1903] 2 K. B. 331.

into the van, of uncoupling and unbraking the van. The fifth question is: 'Was the occurrence of injury to the plaintiff materially and effectively caused by want of reasonable care and skill on the part of the defendants in placing and keeping the van as and where it was placed by them either, (1) in regard to its position, apart from interference by trespassers; or (2) in regard to its danger if interfered with; or (3) in any other way?' *Answer*—'Yes; the company were negligent in not placing the van to the east of the catch-point.' There again, in my judgment, there is nothing to justify the finding that the not placing the van to the east of the catch-point was the effective cause of the accident which occurred. Now, having said so much as to the findings, I will try to state in a few words what I consider to be the law applicable to this case. I do not think that Mr. Williams was wrong when he said that in those cases in which part of the cause of action was the interference of a stranger, or a third person, the defendants are not held responsible unless it is found that that which they do, or omit to do—the negligence to perform a particular duty—is itself the effective cause of the accident. . . . I confess I think on this evidence, such neglect was not the effective cause of this accident; and, as Lord Esher says, if it was not, that means that the defendants are not liable." The jury have found that the effective cause of the accident was not the negligence of the defendants, so that I thoroughly agree in the judgment of the Lord Chief Justice, that judgment was rightly entered for the defendants.

WRIGHT, J.:—

I entirely agree. The case was tried twice. It was tried first by Mr. Justice Gibson and a special jury at the Belfast Summer Assizes. Mr. Justice Gibson simply left to the jury to find for the plaintiff or the defendants, with full and, I am sure, accurate instructions as to the law of the case. Upon that occasion the jury were unable to agree. It was tried a second time before Mr. Justice Kenny and a special jury at the Winter Assizes, and on that occasion the findings of the jury were such that they amounted to either a verdict for the defendants or a disagreement. I do not wonder that plaintiff failed to get a verdict, because of the many cases I have

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been in, either as counsel or as Judge, I have seldom heard of a case in which evidence of negligence was so weak as the present. The evidence for the plaintiff was simply the evidence of three persons who were standing at O'Kane's Corner, and who were called corner-boys by Mr. Harrison. Their evidence is not very strong, but it is encountered by the strongest and most convincing evidence that there was no negligence that I ever read. I mean the evidence of the constable who saw the collision and did his best to prevent it, and the evidence of two persons wholly unconnected with the tramway company who were passengers in the tramcar. I put aside altogether the evidence of the motorman himself. In view of this evidence it is very easy to see why the plaintiff failed, and in my opinion will always fail, to get a verdict. I do not venture to decide whether, if she ever did get a verdict, she would hold it; but I think there will always be very great difficulty in the way of her getting a verdict.

The question in this case is, What is the effect of the answers of the jury? Mr. Chambers relied upon the case of *The Bernina* (1), and contended that a question should have been left to the jury upon the authority of that case, whether the accident was caused by the joint negligence of the tram and the trap. Mr. Harrison says that the case of *The Bernina* (1) is not an authority for the proposition put forward by Mr. Chambers—that the effect of the decision in the case of *The Bernina* (1) was only to overrule the principle laid down in the case of *Thorogood* v. *Bryan* (2), and to decide that the passenger on a car is not so identified with the car as to be disentitled to a verdict by the joint negligence of the driver and someone else. The law of this case is really not in dispute, and the only question is, What is the meaning of the findings of the jury? The first finding is plain enough, viz.—Was Quee's trap negligently driven by him on the day in question? Yes. Upon the second question—"Was the motorman negligent in the driving and management of his car?"—they were unable to agree. Obviously some members of the jury thought that the motorman was guilty of negligence. Then comes the third question, which, at one time, seemed to me to be in a novel form. The learned Judge in his

(1) 13 A. C. 1. (2) 8 C. B. 115.

report says: "Chambers, for the plaintiff, asked me to put an additional question, Whether the accident was caused by the combined negligence of the driver of the trap and the motorman? I declined, inasmuch as I considered that the replies to the questions I had formulated would be sufficient to try the case." The learned Judge was evidently under the impression that the questions he had left involved the question suggested by Mr. Chambers. He may have been wrong in that, and whether he was or not is the question we have to decide. The questions he did leave to the jury were:—

1. Was Quee's trap negligently driven on the day in question? *Answer*—Yes.

2. Was the motorman negligent in the driving and management of his car? Cannot agree.

3. If there was negligence on the part both of Quee and the motorman, was the real and effective cause of the collision (*a*) the negligence of Quee. Yes; or (*b*), the negligence of the motorman? No. Assess damages. £75.

I was somewhat puzzled as to what was the meaning to be attributed to the word "effective." I find that the word has been used by several Judges. In *Sullivan* v. *Creed* (1) Walker, L.J., at page 349, referring to *Englehart* v. *Farrant* (2), says: "Such being the state of the law, the question is, Was the defendant's negligence the effective cause, or, in other words, the cause to which really the accident is due? The act of each is *causa sine qua non*." Lower down in the report the Lord Justice says:—"*Murphy* v. *Great Northern Railway Company* (3) was strongly relied on, but there on the facts the misconduct of the badge porters was the *effective* cause of the accident"; and he concludes his judgment at page 354 by saying: "Upon the whole, for the reasons I have referred to, I am of opinion that the admitted negligence of the defendant was the effective cause of the injury to the plaintiff." I think the meaning of the findings of the jury is that even though there may have been some negligence on the part of the motorman in not putting on the brake in time, or in some error of judgment committed by him, the effective cause, the proximate

(1) [1904] 2 I. R. 317. (2) [1897] 1 Q. B. 240. (3) [1897] 2 I. R. 301.

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cause, of the accident was the negligence of the driver of the trap; and if there was negligence on the part of the driver of the tramcar, it had nothing to do with the ultimate result.

J. L.

Appeal. April 21, 22. May 17.

The plaintiff appealed (1).

James Chambers, K.C., and *T. J. Campbell*, for the appellant :—

Quee was practically up to the point of collision before he saw the tramcar. Even if Quee was driving too rapidly, if the motorman could, by reasonable skill, have avoided the collision, the defendants are liable: *The Bernina* (2). If the accident would not have happened but for the negligence of the driver of the tramcar, the plaintiff is entitled to a verdict. The proper question would be :—Was there negligence on the part of the driver of the tramcar? and it is no answer to say that there was negligence on the part of Quee : *Mathews* v. *London Street Tramway Co.* (3).

John Gordon, K.C., R. F. Harrison, K.C., and *T. Harrison*, for the respondents :—

The second question is simply a question of abstract negligence, because when the jury came to answer the third question, they absolutely negatived negligence on the part of the tramway. The findings of the jury must be taken as a whole; and so taken, they have found that it was not the defendants' negligence which caused the damage; it was simply Quee's negligence : *McDowall* v. *Great Western Railway Co.* (4); *Murphy* v. *Great Northern Railway Co.* (5). Even if the second question had been answered against the defendants, the finding on the question of proximate cause is in their favour ; even if there was negligence, it did not cause the collision. But we submit that on the evidence the defendants were not

(1) In the Court of Appeal, before SIR SAMUEL WALKER, C., and FITZGIBBON and HOLMES, L. JJ.

(2) 13 A. C. 1.

(3) 58 L. J., Q. B. 12.

(4) [1903] 2 K. B. 331.

(5) [1897] 2 I. R. 301.

guilty of negligence: the testimony of every independent witness is in favour of the Tramway Co. *The Bernina* (1) only decided that a passenger on board a ship is not so identified with the captain as to be responsible for his negligence.

SIR SAMUEL WALKER, C. :—

May 17.

In this case the Corporation of Belfast, who own the tramways in that city, are sued by a lady who was undoubtedly injured by the negligence, either of the defendants solely, or of a man named Quee solely, or of both the defendants and Quee jointly. As regards her, the doctrine of contributory negligence has no application whatever. She was confessedly innocent of all blame, as she stood on the footpath at the corner of Albert Street.

Falls Road, a main artery of Belfast, is intersected at right angles by two streets, Northumberland Street and Albert Street, which are continuations of each other. Quee was driving up Northumberland Street with the view of crossing Falls Road into Albert Street. A tramcar coming down Falls Road collided with his trap. The driver was flung out and struck the plaintiff, who was innocent of all blame, and in no way contributed to her injury.

The case has, unfortunately, been twice tried. At neither trial was it suggested that there was not evidence to go to the jury of negligence against the Tram Company. At the first trial Gibson, J., left to the jury only the question, whether the defendants were guilty of negligence causing the injury, and the jury were unable to agree.

At the last trial Kenny, J., left to the jury the following questions :—

(1) Was Quee's trap negligently driven by him on the day in question? Yes.

(2) Was the motorman negligent in the driving and management of his car? Cannot agree.

(3) If there was negligence on the part both of Quee and the motorman, was the real and effective cause of the collision : (*a*) the negligence of Quee? Yes. Or (*b*) the negligence of the motorman? No.

(1) 13 A. C. 1.

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Sir Samuel Walker, C.

The law on the subject is, I think, accurately stated in Pollock on Torts, p. 459:—"Another kind of question arises where a person is injured without any fault of his own, but by the combined effects of the negligence of two persons, of whom the one is not responsible for the other. It has been supposed that A could avail himself, as against Z, who has been injured without any want of due care on his own part, of the so-called contributory negligence of a third person B. 'It is true you were injured by my negligence, but it would not have happened if B had not been negligent also, therefore you cannot sue me, or, at all events, not apart from B.' Recent authority is decidedly against allowing such a defence, and in one particular class of cases it has been emphatically disallowed. It must, however, be open to A to answer to Z, 'You were not injured by my negligence at all, but only and wholly by B's.' It seems to be a question of fact rather than of law what respective degrees of connexion, in kind and degree, between the damage suffered by Z and the independent negligent conduct of A and B will make it proper to say that Z was injured by the negligence of A alone, or of B alone, or of both A and B. But if this last conclusion be arrived at, it is now quite clear that Z can sue both A and B."

Suppose in the present case the jury had found that the plaintiff was injured by the negligence both of the Tram Company and of Quee, the plaintiff had a good cause of action against the Tram Company. There is no verdict that the plaintiff was injured by the negligence of Quee alone. There is a verdict that on the assumption that both the Tram Company and Quee were guilty of negligence, without which the accident would not have happened, Quee, as between the two, was the one whose negligence was the effective cause; but I think this question only arises properly when a plaintiff is charged with contributory negligence, and has no application to the case of an innocent outsider who has suffered through the acts of both, and who is not driven to apportion the wrongs in order to find a defendant to sue; otherwise there could be no such joint negligence as would enable the innocent party to have a right of action against either of those two negligent persons.

The questions left to the jury would be obviously proper if the

plaintiff were charged with contributory negligence, but in a case like the present the question was not whether the negligence of the tram or Quee was the proximate, as distinguished from the remote, cause of the injury, but whether there was any negligence on the part of the driver of the tram, without which the injury would not have happened.

In my opinion, having regard to the disagreement of the jury on question 2, we have not sufficient materials for giving judgment for the defendants upon the findings on question 3.

Kenny, J.,'s letter to the Lord Chief Justice, explanatory of his charge, makes plain to my mind the infirmity in the findings as producing finality. He says—[the Lord Chancellor read the letter, *ante*, p. 441].

I have had the advantage of reading the elaborate judgment of Fitz Gibbon, L.J., and I concur with regret in the conclusion at which he has arrived—that the findings at the last trial leave the liability undetermined, and that there must be a new trial.

FITZ GIBBON, L.J. :—

In my opinion, the findings of the jury, read with their disagreement upon question 2, do not supply "all the materials necessary for finally determining the questions in dispute," and therefore we cannot give judgment for the defendants "upon the findings." If there be—and in my opinion there is—a material question of fact on the evidence which the jury has not answered, the Court cannot enter judgment.

Furthermore, I do not think that question 3 was so put as to make the finding upon it conclusive; and on the Judge's report, and especially on his reply to the Lord Chief Justice, I cannot hold that the jury was rightly directed as to the law, or fully instructed as to the evidence which would entitle the plaintiff to a verdict, where the alleged injury resulted from a collision for which she was in no way to blame, but which may have been caused by the negligence of *one*, *other*, *or both* of two strangers to her.

The question was not whether the negligence of "trap" or "tram" was the "*proximate cause*" of the injury, nor whose negligence was the *causa causans* or the *causa sine qua non*, but

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simply whether there was any evidence of negligence—*i.e.*, of any want of reasonable care—on the part of the tram-driver *without which the injury would not have happened.* To relieve the defendants from liability, it was not enough to show that Quee was guilty of negligence, recklessness, or misconduct, however gross, or however directly and immediately causing the injury. The plaintiff was entitled to a verdict against the defendants, if the tram-driver could by reasonable care have avoided colliding with the trap.

The mention of "contributory negligence," or of a proximate as distinguished from a remote cause, can only create confusion in a case like the present, where one only of two alleged wrong-doers is sued by a plaintiff who is in no default whatever, for an injury caused by their combined action. In the Judge's report, and in the judgments below, I find terms used, and principles laid down, which—I say with all respect—are appropriate to cases in which negligence of the plaintiff is alleged as a defence, or where there is "fault on both sides," but which are inapplicable to this case.

I must summarise the law, to show how vital this distinction is, and I do so in words which I borrow, or adapt, from Sir Frederick Pollock (1) :—

> The true ground of contributory negligence being a bar to recovery is that it is the *proximate cause* of the mischief. But independent negligent acts of A and B may *both* be proximate in respect of harm suffered by Z, though either of them, if committed by Z himself, would have prevented him from having any remedy for the other. Thus it appears that the term "proximate" is not used in precisely the same sense in fixing a negligent defendant's liability and a negligent plaintiff's disability, and it is therefore dangerously ambiguous. Where the negligent acts are *simultaneous*, as in the case of two persons colliding at a street corner, the rule is, that *if the plaintiff could, by the exercise of ordinary care, have avoided the accident, he can not recover*; but where they are successive, *he who last has an opportunity of avoiding the accident, notwithstanding the negligence of the other, is solely responsible.* And the ground of both rules is the same—that the law looks to *the proximate cause*; or, in other words, will not measure out responsibility in halves or other fractions, but holds that person liable who was *in the main* the cause of the injury.

(1) Pollock on Torts (7th edition), pp. 454–9.

But this law has no application where a person is injured without any fault of his own, but by the combined effects of the negligence of two persons, of whom the one is not responsible for the faults of the other. *The Bernina* (13 A. C. 1) has emphatically disallowed the defence to either of them of the *so-called contributory negligence* of the other. It must be open to A to answer to Z: "You were not injured by my negligence *at all*, but *only and wholly* by B's." It is a question of fact what respective degrees of connexion, in kind and degree, between the damage suffered by Z and the independent negligent conduct of A and B will make it proper to say that Z was injured by the negligence of A alone, or of B alone, or of both A and B. But if this last conclusion be arrived at, it is now quite clear that Z can sue both A and B. The plaintiff is not bound to show, in a case where no negligence of his own is alleged, that the defendants' negligence was not only *a cause* of the damage sustained, but *the whole of the cause.* The strict analysis of *the proximate or immediate cause* of the event, the inquiry *who could last have prevented the mischief* by the exercise of due care, *is relevant only where the defendant says that the plaintiff suffered by his own negligence.* Where negligent acts of two or more independent persons have *between them* caused damage to a third, the sufferer is not driven to apply any such analysis to find out whom he can sue. He is entitled, within the limits set by the general rules as to remoteness of damage, to sue all or any of the negligent persons.

This being the law, it is well, before referring to the facts, to define the duty to the plaintiff, who was lawfully using the footpath, of those who were driving vehicles at right angles to each other towards the intersection of the streets where the collision happened. At the trial, attention does not appear to have been called to the identity of this duty, as resting on the drivers of both "trap" and "tram." Each was bound to drive at a reasonable speed, and, as he approached the cross-streets, to see that no person or vehicle was coming dangerously near from the other direction. Each driver was also bound to have his vehicle under such control as would enable him to pull up in time to avoid a collision with any person, vehicle, or thing which he might reasonably expect to see as the other street opened to his view. A runaway horse, a straying child, or a drunken man, was as much to be avoided, if reasonably possible, as any other object—including a reckless driver.

The Falls Road was the widest street of the three—the angles

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and distances at which the approaching trap could have been seen by the tram-driver are shown on the map proved at the trial. The driver himself said that he was going at 8 miles an hour, downhill; that he could stop his car in the length of itself—9 yards—going at 8 miles an hour; that he saw the trap 12 yards from the place where the collision occurred; that it never slowed; he expected the trap would cross; he did not think the horse was under proper control. As a matter of fact, the horse and the whole forepart of the trap were clear of the tram before the collision, so that if the trap had moved 1 yard faster, or the tram had moved 1 yard slower, while the tram was covering the 12 yards which it ran after the driver saw the trap, the collision would not have happened. The constable, produced by the defendants,

> "saw both trap and tram approaching the cross-roads 30 or 40 yards from where he was at the corner; at that distance he saw that if one of them did not pull up, there was sure to be a collision; he put up his hands against Quee, who, according to him, was coming at an ordinary trot, not a furious pace at all; the motorman could see him with his hands up; he did not hear any gong; the tram was going from 7 to 8 miles an hour; he thought Quee ought to have slackened speed; the motorman should have pulled up, too; the motorman had ample time to pull up; a foot or two would have cleared the tram; it was the tram hit the trap, not the trap the tram."

The tram-driver said that he did not see the constable raise his hands, but he did see the trap coming on as if the horse was not under proper control, and he expected that it would go fast enough to cross safely before he reached it.

I do not discuss the details of the evidence given by the witnesses for the plaintiff, which is stronger against the defendants than that of the constable; nor ought I, in any way, to minimize the evidence given on behalf of the defendants; all that was for the jury. For the present purpose, I have read enough to show that the question could not have been withdrawn from the jury, whether the driver of the tram, by the exercise of reasonable care, by keeping a better look-out, by slackening speed as he approached the corner, or by applying his brakes when he first saw

Quee, could have slowed down sufficiently to let the tail of the trap clear the rails before the tram ran into it.

We have been told that one question only was left to the jury at the first trial, and we are at liberty to assume that it involved the consideration whether the collision was caused by—or would not have happened without—the want of reasonable care to avoid it on the part of the tram-driver. The jury disagreed on that occasion, and it does not appear to have been suggested, at either trial, that Quee's negligence could entitle the defendants to a verdict, unless the third defence was proved, which alleges that "the collision took place *solely* in consequence of the neglect and unskilful driving of the driver of the trap."

But the defendants now contend that the findings on question 3 amount to a verdict for them; that is to say, that they amount to a finding that the plaintiff was injured "*only and wholly*" by the negligence of Quee. To justify judgment for the defendants, this must be a finding that Quee's negligence was not only *a cause* of the damage sustained, but the *whole of the cause*—and that there was *no fault, whether of omission or commission*—on the part of the driver of the tram, either in negligent driving, or in the failure to exercise all reasonable care by which the collision might have been avoided, whether Quee's driving was, or was not, the chief, the primary, or the proximate, cause.

In the first place, such a construction of the findings is inconsistent with the terms of question 3, which begins with the words: "If there was negligence on the part *both of Quee and the motorman.*" Secondly, it is inconsistent with the way in which the judge reports that he put the questions to the jury. Mr. Chambers, for the plaintiff, asked him to put an additional question, viz.—"Whether the accident was caused by the *combined negligence* of the driver of the trap and the motorman." This was a material and proper question, and the judge declined to put it, "inasmuch as he considered that replies to the questions he had formulated would be sufficient to try the case." This could not be so, unless *both* questions 1 and 2, as put, were answered; and on question 2 the jury wrote—"Cannot agree." The vital question was, whether the plaintiff was injured by the negligence—(*a*) of Quee alone; or (*b*) of the tram-driver alone; or (*c*) of both Quee and the

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tram-driver; and an affirmative answer to *either* (*b*) *or* (*c*) would be a verdict for the plaintiff. But, in no case, could question 3 try the question of combined negligence, because it expressly assumed negligence "on the part *both* of Quee and the motor-man."

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The learned Judge states that he pointed out to the jury what he conceived to be the mutual obligations of vehicles where *one of the two* was approaching a considerable thoroughfare from a side street, and where one was free to diverge as its driver thought right, while the other was restricted to a defined track. He does not say how he defined the obligations of the tram-driver, and he gives no indication that he told the jury that the duty of both drivers to persons lawfully using the footpath was the same. He gave his own opinion that the driver of the trap was driving recklessly in trying to cross in front of the tramcar, but he does not report what he said, or whether he said anything, as to the duty of the tram-driver to use every reasonable care to avoid him, no matter how recklessly he was driving. He declined to call the jury out, on Mr. Chambers' request, to tell them that if the motorman could have applied the brakes in time to avoid the accident, the omission to do so was *the real and effective cause* of it, which plainly was the law. His ground of declining was *that he had already given them their instructions*, and his instructions, as reported, did not include what Mr. Chambers asked him to say.

In his reply to the Chief Justice, Kenny, J., says that he *did not put a question to the jury as to joint negligence*, but he charged them as to the *possibility of there being negligence on both sides*, and in the direction of the negligence of the driver of the trap being "*the proximate cause*" of the injury; that is to say, he did not put the question of joint negligence, but he charged the jury in the direction of the very inquiry which is "relevant only where the defendant says that the plaintiff suffered by his own negligence."

Having suggested that "whatever negligence there might be was more in the nature of an error of judgment in not applying his brakes earlier," he proceeds:—"*But then came the question of proximate cause.*" With all respect, that question never came. He says, however, "I put it to them whose negligence was *the proximate, real immediate and effective cause* of the collision, and I

told them to consider *that question, on the assumption that both parties were negligent*; and I told them that if either party could have avoided the consequences and effects of the other's negligence," not that the plaintiff would be entitled to a verdict, but that "the former would have been guilty of the *proximate and effective negligence* that caused the collision." This must mean that, in the case put, the former alone would be answerable, which would be the law only in a case of "contributory negligence," and is not law in this case of an innocent sufferer. "Proximate" and "immediate" are relative terms which imply the co-existence of "remote" and "secondary" negligence, and the use of these terms is misleading where an innocent plaintiff is complaining of an injury caused by the combined negligence of two people, one of whom may have proximately and immediately caused the injury, and the other may have only remotely contributed to it, yet both are answerable to the plaintiff.

The charge, therefore, appears to me to have been unduly favourable to the defendants in the presentation of the facts; in the statement of the duties of the two drivers to the public; in the statement of the law; and in the framing and interpretation of the questions.

The Judge left to the jury:—

1. Was Quee's trap negligently driven by him on the day in question? *Answer*—Yes.

2. Was the motorman negligent in the driving and management of his car? *Answer*—Cannot agree.

We cannot impute to Kenny, J., that he did not make the jury understand that the *negligence* referred to in each question was the same, and meant *actionable default*, whether of omission or of commission—meant *negligentia dans locum injuriae* and nothing less. He wrote to the Chief Justice that he suggested that "*whatever negligence* there might be in the case of the tram-driver was *more in the nature of an error of judgment* in not applying his brakes sooner," and the disagreement of the jury on the second question is an explicit declaration that they did not accept this suggestion; they could not agree upon the vital question whether the conduct of the tram-driver amounted to actionable negligence, or was

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merely an error of judgment. Kenny, J., himself so understood it; for he, at first, declined to give judgment, "the jury being unable to agree on the question of the motorman's negligence"; he ultimately acceded to the application of the defendants on grounds of expediency which, having regard to the two disagreements, may have justified the course taken.

All the judgments in the King's Bench bring in the misleading, or inappropriate, terms "proximate cause," and "contributory negligence." The Chief Justice dismissed the letter of Kenny, J., with the remark—which I can not follow—that it "did not throw any additional light on the subject," and he dealt with the report as it originally stood. He thought that question 2, upon which the jury disagreed, must be taken to have been dealt with by them "as if it was limited to this—Was there any default *at all* upon the part of the motorman? any want of judgment or skill, irrespective of the consideration whether that want of judgment or skill *contributed as a proximate cause* to the happening of the accident."

To this passage Sir F. Pollock's remark (1) directly applies:—

> "The phrase 'contributory negligence of a third person,' which has sometimes been used, must be rejected as misleading. Peter, being sued by Andrew for causing him harm by negligence, may prove if he can that not his negligence, but *wholly and only* John's, harmed Andrew. It is useless for him to show that John's negligence was 'contributory' to the harm, except so far as evidence which proved this, though failing to prove more, might practically tend to reduce the damages."

The question whether each, or either, of two wrong-doers, when sued alone, can reduce the damages by throwing part of the blame on the other, and so can indirectly obtain contribution from his co-tort-feasor, is not now before us; but I am not to be taken as holding that this can be done. The possibility that it may be, perhaps, explains the reason for putting question 3 to the jury.

The Lord Chief Justice read the answers to (*a*) and (*b*) in question 3 together, as a finding "that the *sole*, the *exclusive effective* cause of the accident was the negligence of the driver of the

(1) Pollock on Torts, p. 462.

trap," and he does this although the question assumes negligence of both, and the words *sole* and *exclusive* do not appear to have been used to the jury. On the contrary, Kenny, J., states that he told the jury that the party who could have avoided the consequences of the other's negligence would have been guilty of *the proximate and effective negligence that caused the collision*, and if the case was one of combined negligence injuring an innocent party, this was a misdirection, because both and each would have been answerable to the plaintiff.

Boyd, J., says:—"The jury have found that *the effective cause* of the accident was not the negligence of the defendants"; but this leaves untouched the question whether the tram-driver, by reasonable care, could have avoided an accident of which Quee's negligence was "the effective cause," and, furthermore, he (Boyd, J.) omits to notice that "*proximate and effective*" were the words used by Kenny, J., in explaining the question to the jury.

Wright, J., after saying that "he had seldom heard of a case in which evidence of negligence was so weak; and that it was met by the strongest and most convincing evidence that there was no negligence that he ever read," observed upon the second question that "*obviously some members of the jury thought that the motorman was guilty of negligence.*" Yet he explained the findings by saying that "even though there might have been *some negligence* on the part of the motorman in not putting on the brake in time, *or* in some error of judgment committed by him, the effective cause, the *proximate cause* of the accident was the negligence of the driver of the trap, and if there was negligence on the part of the driver of the tram-car it had nothing to do with the ultimate result."

I don't understand how actionable negligence on the part of either driver could have "nothing to do" with the resulting collision, and it is plain that the jury could not agree that the alleged negligence amounted to nothing more than "some error of judgment."

I am clearly of opinion that the case must be sent to a new trial, because it has not yet been found whether the plaintiff was injured solely by Quee's negligence; solely by the negligence of the tram-driver; or by the combined negligence of both—one

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precipitating, and the other failing to avoid, the collision which injured the plaintiff.

The costs of the abortive trials must be costs in the action; but in my opinion the defendants should pay the costs, here and below, incurred upon the plaintiff's motion to set aside the judgment entered for the defendants, and for a new trial, which motion, in my opinion, cannot be refused without usurping the functions of a jury which has twice disagreed upon the cardinal question in the case.

HOLMES, L.J. :—

The result of my consideration of this case is, that I agree with the conclusion arrived at by the Judge who tried the action and of the Divisional Court which upheld his judgment. There is no legal question in controversy. The misfortune which the plaintiff sustained, and for which she seeks to recover damages, was caused by a collision between a motor tram and a pony cart. Assuming that the collision was the result of negligence in the management of those conveyances, the point for the jury to determine was whether such negligence is to be attributed to one of the drivers or to both. If to both, it is admitted that the defendants are as fully liable as if their servant was the sole cause of what happened. The question is essentially one of fact; and the only controversy is whether it has been tried and settled by the jury. I am of opinion that it has. It is my experience, and I think that of other Judges, that, in trying an action of this kind, it is important to impress on jurors the distinction between negligence that causes the alleged wrong and an immaterial act of carelessness or error of judgment. In the present case, either vehicle might have been driven at a quicker speed than was prudent, and yet the collision would have taken place just as it did, if one of them had been travelling at a proper and moderate pace. If that were so, I don't think that the harm was caused by the driver of the last-mentioned vehicle. This, I believe, was present to the mind of Mr. Justice Kenny when he was formulating the questions for the jury. He left them the three questions in the first instance; and he manifestly intended that, even if the first two were found in the affirmative, the third was still to be

answered, namely, Was the real and effective cause of the collision the negligence of Quee or the negligence of the motorman? What would a jury, composed of clear-headed business men, understand by these words? Surely, they would consider that the person who was the real and effective cause was alone responsible. I cannot conceive that negligence which was not the real and effective cause of what happened could have contributed to the wrong complained of. If this be so, the disagreement as to the second question was immaterial. No doubt, the form of the question is open to the criticism that it might suggest that the real and material cause could not have been the negligence of both drivers. But I should be obliged to take a very low estimate of the intelligence of a jury—described by Kenny, J., as excellent—if I were to assume that they read the question in this way. I believe that if they thought the collision was the result of the negligence of both, they would have said so without involving themselves in metaphysical distinctions. Therefore, as far as I am concerned, I am in favour of dismissing the appeal. In coming to this conclusion it is possible that I have been unconsciously influenced by a not unnatural reluctance to send a small case to a third trial; but I have tried to place myself in the position of the jurors, and knowing what I would have meant if I had given their answer to the third question, I assume that their meaning was the same.

Solicitor for the plaintiff: *James L. M'Donnell.*
Solicitor for the defendants: *Frank Kerr.*

R. D. M.

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BARRETT *v.* IRVINE (1).

(1906. No. 7487.)

Contract—Agency—Special or general agent—Multiplication of acts of special agency—Holding out—Ratification.

B. sold a racehorse to H., a minor, upon a representation by H. that his mother would pay. H. on former occasions had, to the knowledge of B., purchased horses for which the mother afterwards paid. The mother allowed the son to keep a pack of hounds at her residence, and paid for his equipment as master. She went frequently to races to see her son ride, and was kept informed, when not present, of the results of races in which he engaged. In an action by B. against the mother for the price of the horse, it was contended that the conduct of the mother in relation to the son's former purchase transactions, and her acquiescence in his sporting proclivities, constituted the son her general agent for the purchase of horses. The case was tried twice, owing to a disagreement of the jury at the first trial, and in the interval between the trials the mother entered into negotiations with B. for the return of the horse, a course which B. agreed to accept upon two alternative conditions, which the mother agreed to consider; and this incident was relied upon by B. at the second trial as a ratification by the mother of the contract with the son:—

Held, that the facts proved did not amount to evidence of general agency in the son.

Held, also, that no multiplication of acts as special agent can convert a special into a general agent, so as to bind a principal in a transaction of this kind.

Foley v. *Carden* (4 New Ir. Jur. 198) followed.

Held, also, that the negotiations between the trials were not of such a character as to amount to ratification by the mother.

EDWARD BARRETT, the plaintiff in this action, was a farmer residing at Garryduff, in the county of Cork. The defendant, Marjory Irvine, was a widow, having a residence at Grancore, near Clonakilty, in the county of Cork. She had a son Hugh, born in the year 1888, and therefore, at the time of the occurrences in question, a minor. The son was Master of the Roscarberry Fox-

(1) In the King's Bench Division, before LORD O'BRIEN, L.C.J., and GIBSON and KENNY, JJ.

hounds—a heterogeneous pack—which were kept at the defendant's residence; his red coat and the horse he hunted with were paid for by the defendant. In his official capacity as Master, he issued certificates to gentlemen who had hunted with him during the season. The defendant, who was absent a good deal in Scotland, alleged that she disapproved of the hunting and racing proclivities of her son, who had got out of her control; but she admitted that she went to race meetings with him, paid entrance fees for him, and, when not present herself, received wires stating the result of the races in which he took part. She had, on several occasions, paid for horses which her son had bought, including a sum of £129, four years before, for a horse called Faugh-a-Ballagh. Barrett, who knew of some of these purchases by the son, brought a horse called Easter Boy to Clonakilty Races, in May, 1906. At the races, Hugh Irvine came up to him, looked over the horse, and asked him would he sell it. Barrett said he would not, whereupon Hugh, in the presence of Barrett and Patrick Burns, said: "You might as well sell him; my mother is starting a stud-farm, and we are after buying another horse like him." Thereupon Barrett sold Hugh Irvine the horse for £60 and half the "winnings" of the first two races the horse would win. Later in the day, at an interview in the hotel, Hugh Irvine said to Barrett: "My mother is in Scotland; I'll write to her to-morrow morning and shall send you a cheque by Saturday or Monday." Barrett said: "Are you quite sure your mother won't object to pay for the horse?" and Hugh replied: "There is not the least doubt about it; she paid for all the horses I ever bought." Barrett said that, at the date of the sale, he knew that Hugh was in the habit of buying horses for his mother—he knew that he had bought Grey Star for £25, and Diocletian for £100, when she was not at home, giving three of her horses in part payment. She was sued for £45, the price of Lost Love, sold by Johnson to Hugh shortly before the sale of Easter Boy, and was decreed; she appealed, but before the appeal was heard she withdrew it and paid the money. When the defendant came home from Scotland, she found three strange horses in the stable—Easter Boy, Lost Love, and Diocletian, while three of her own horses had been given in part payment of the price of the latter. She swore that she had nothing

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to say to the purchase of any of them. She paid £20 to Sheehan to get rid of the transaction about Diocletian; she did so in response to a wire from her son, but she had no idea of the nature of the transaction. Barrett did not receive his money, and at Cork Park Races complained to Hugh, who said that his mother had not yet come home, but that a cheque would be sent in a few days. On the 24th May he got a letter from Hugh, in which he said: "I got an awful doing over Easter Boy; my mother is going to sell out all the racehorses we have." Barrett refused to take back Easter Boy, as it was a stallion, and the season was passed for his services, and not getting paid, he instituted the present action. The action was tried for the first time at the Cork Summer Assizes, 1906, when the jury disagreed. In the following February, there was an interview at Turner's Hotel, Cork, at which the defendant asked the plaintiff to take back Easter Boy from her, that she did not want him, as she was going to sell all the horses. The plaintiff said that he would if she compensated him for his loss. She asked what did he want. He gave her the choice of two courses: he said he would take £70 and take the horse back, if as sound as when he gave him up, paying his own costs; or, he would take £85, and she to keep the horse. She said she would let him know the following morning which settlement she would take. Directly or indirectly, he had never heard from her afterwards. The incident at Turner's Hotel was relied upon by the plaintiff as a ratification by her of the contract with the son of the sale of Easter Boy to Hugh. The action was tried a second time before Johnson, J., and a common jury, at the Cork Spring Assizes, 1907, when the learned Judge was asked by counsel for the defendant to direct that there was no evidence: (*a*) of authority in Hugh to buy this horse for the defendant; (*b*) of any general authority to buy horses; (*c*) of any holding out as agent; that there could be no "ratification" by a third party of a contract not purporting to be on his or her behalf; that there was no evidence that the horse was sold to the defendant; that plaintiff's evidence was, that the horse was sold to Hugh, who represented only that the mother would pay for him; that plaintiff never knew of any act of agency prior to the sale, and that no evidence could be given

of conversations or transactions in the absence of the defendant until it was first proved that the person alleged so to be was, in fact, defendant's agent in the matter.

The learned Judge refused to direct, and left four questions to the jury, which are set out with their answers:—

1. Did defendant hold out her son, Hugh Irvine, as her agent, to buy for her—(*a*) a racehorse? Yes. (*b*) a stallion? No.

2. Did plaintiff act on the assumption that defendant's son was such agent? Yes.

3. Did defendant ratify the sale of Easter Boy to her son? Yes; by the interview at Turner's Hotel.

4. Was Easter Boy sold by plaintiff to, and purchased by, defendant's son—(*a*) for himself, or (*b*) for his mother, the defendant? *Answer*—For the mother.

Judgment was entered for the plaintiff for £60, the price of the horse, with costs.

The defendant moved to set aside the verdict and judgment, and to have same entered for her, on the grounds that the learned Judge, at the trial, should have directed a verdict for her, as there was no evidence to sustain the plaintiff's case; that evidence of conversations and transactions with a third party in the absence of the defendant was improperly admitted without any evidence of agency first given; and that the findings of the jury were unsatisfactory, and unsupported by evidence.

P. D. Fleming, K.C. (with him *A. M. Sullivan*), for the defendant:—

At the time of the making of the contract Hugh did not profess to act on behalf of his mother. Such a contract could not be ratified by her so as to render her able to sue, or liable to be sued, upon it: *Keighley* v. *Durant* (1). There is no evidence of the mother holding out the son as her agent, so as to make her liable to the plaintiff for the price of the horse purchased by him. To make the contract binding on the alleged principal the holding out must be to the particular individual who says he relied on it, or

(1) [1901] A. C. 240.

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under such circumstances of publicity as to justify the inference that he knew of it, and acted on it: see the judgment of Lord Lindley in *Farquharson* v. *King* (1). To succeed in the action the plaintiff must show such a general authority to the son as to constitute him the general, as distinguished from the special, agent of the mother: Leake on Contracts (ed. 1906), p. 317; *Morris* v. *Bethell* (2). There is no evidence of a general authority in this case. No multiplication of acts done as special agent can convert a special agent into a general agent, so as to bind the principal in a transaction of this kind: *Foley* v. *Carden* (3); see also *Brady* v. *Todd* (4).

Moriarty, *K.C.*, and *Hon. Cecil Atkinson*, for the plaintiff:—

When any person, by word or conduct, represents, or permits it to be represented, that another person has authority to act on his behalf, he is bound by the acts of such other person with respect to anyone dealing with him as an agent on the faith of any such representation, to the same extent as if such other person had the authority which he was so represented to have: Bowstead on Agency (ed. 1907), p. 278. General agency will be inferred where a landed proprietor sends his steward habitually to the neighbouring farms and markets to make sales and purchases for him in matters connected with the management of his estate: see judgment of Lord Denman, C.J., in *Trueman* v. *Loder* (5); see also *Levita's Case* (6) and *Low* v. *McGill* (7). The conduct of the defendant at the interview at Turner's Hotel amounted to ratification, which will always be implied, wherever the conduct of the person in whose name or on whose behalf the act or transaction is done, or entered into, is such as to show that he intends to adopt or recognize such act in whole or in part; and, in the case of an agent exceeding his authority, may be implied from the silence or acquiescence of the principal: see Bowstead on Agency (ed. 1907), p. 55.

(1) [1902] A. C. 325, at p. 341.
(2) L. R. 4 C. P. 765.
(3) 4 New Ir. Jur. 198.
(4) 9 C. B. (N. S.) 592.
(5) 11 Ad. & Ell. 589, at p. 595.
(6) L. R. 5 Ch. App. 489.
(7) 10 L. T. (N. S.) 495.

Lord O'Brien, L.C.J.:—

If this case is deemed worthy of a place in our law books, or is made the subject of story in any metropolitan or local magazine, it may be well intituled "The Enfant Gâté of Roscarberry." A fond mother paid some money—the price of horses which her son, a spoilt boy had bought, and it is argued that she thereby held him out to the world as, and constituted him, her general agent to buy horses on her credit to any extent his juvenile fancy might suggest. That, in fact, if another Waterloo was to be fought in defence of the liberties of Europe, this impulsive youth might horse, at her expense, a brigade of the Greys, Inniskillings, and 1st Royals, to add another page to the history of chivalry. If the law permits this, the man in the street, to whom I have so often referred as the embodiment of common sense, may well regard Mr. Bumble's famous *dictum* not merely as historical, but true. The defendant, Mrs. Irvine, is sued for the price of a horse called "Easter Boy"—her son, the spoilt lad I referred to, bought him from the plaintiff during the absence of his mother in Scotland. It is admitted she knew nothing about the transaction—about the purchase—that she did not in any way expressly authorize the purchase. Special authority to purchase the particular animal is admitted not to have existed, but it is said that she paid the price of some three or four other horses the boy bought, and that therefore in some way she held him out as her general agent to buy horses. This is an alarming doctrine. During the argument I put the following case to counsel. Take, I said, the instance of a father who has a daughter who hunts—who is fond of horses, and knows something about them—she buys some three or four horses, buying them during an interval of some years, and the father pays for the horses, and keeps them at his expense for the daughter. Does that fact, the fact of the payment of the price of the horses by the father and the keep of them by him, supply any evidence that the father held out the daughter, constituted the daughter, as his general agent to buy as many horses as she pleased—to buy, for instance, all the horses at the Dublin Horse Show! This, in my opinion, would be the very extravagance of absurdity; but let me assume—which is not the fact—that there was in this case clearly proved an antecedent authority to buy from time to time some

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particular horses. It has been decided in this Court that no multiplication of transactions, each of which depended upon particular special authorization, can constitute general agency: see the case of *Foley* v. *Carden* (1), which was affirmed on appeal. However, it is argued that there are some additional circumstances in this case: there was a civil-bill decree obtained against the mother in relation to the price of another horse, and the fact that the Roscarberry hounds were kept in premises belonging to her. I do not think that the civil-bill decree was any evidence whatever of a general agency in the son. She had made a promise in the goodness of her heart in a particular transaction, and was decreed for the sum she promised to pay. As to the hounds, I cannot conceive how, allowing a subscription pack to be kept in some out-offices is any evidence that she authorized the Master of the pack to act as her general agent in the purchase of horses.

No doubt a fond mother paid for a pink coat for her sporting son, and, no doubt, paid also for a horse to carry him in the hunting-field—£25, was, I believe, the price. I hope this horse was not what is sometimes called "a clever cripple." In these country places good bargains are not infrequently picked up.

The defendant was referred to as if she kept a fashionable pack of hounds in elaborate kennels.

The Roscarberry pack was certainly interesting by reason of its diversified character. Variety has a charm of its own. What is unique is always attractive. The pack was composed of all sorts and conditions of hunting dogs—uniform neither in size nor pace nor breeding—and though it was styled the "Roscarberry Foxhounds," it could boast of only one pure-bred foxhound—*lucus a non lucendo*. The proclivities of the pack were as diversified as its composition; it pursued with equal ardour every description of quadruped, whatever the nature of the scent. I am not sure that the feathered tribe was altogether without some measure of attention. However, though the ménage at Roscarberry was not quite up to Leicestershire standard, I feel quite certain that the heart of the young Master was, so far as related to physical courage, in the right place, and that he often afforded good sport,

(1) 4 New Ir. Jur. 198.

and that the followers of the pack had not infrequently, to use an expression amongst hunting men, "a clinking run." The mother's heart was proud, and the field was at once gratified and grateful. This was all interesting and picturesque, but it did not at all involve that the mother held out the son as her general agent to buy horses. It has been also said that the defendant paid some of the expenses of her son in connexion with racing matters, such as the cost of the entry of horses. This certainly in no way tends to establish the general agency that has been contended for. It has been further alleged that she attended some race meetings. No doubt she did. A sporting instinct, in my opinion, is not to be decried. It would be difficult indeed to eliminate it from our Irish nature. The defendant went to see her son ride, and, I dare say, the mother's heart beat a little loudly when she saw him clear some stiff regulation fence amid the plaudits of an admiring crowd; but surely it is fantastic to allege that this affords any evidence of a general agency in the son to buy horses at the mother's expense. Indeed, I think it is quite plain, from Mr. Barrett's own evidence, that he sold Easter Boy, not to or for the mother, but to the son, on his assurance that he would get the mother to pay. This is plain from the evidence of the plaintiff himself, and of his witness, Mr. Burns. He (Barrett) swore, in his cross-examination, that he said to the son, "Are you quite sure that your mother won't object to pay for the horse?" and that he said this, as he wanted to make sure he would be paid.

The plaintiff's direct evidence is to the same effect. He swore that in reply to the son's statement that the horse was his (the son's) he said "yes," and that he (the son) should pay for him. I think the answer of the jury to sub-question (*b*) of question 4 is not only not supported by the evidence, but is directly in the teeth of it.

It is argued, however, there was ratification on the part of the mother. There was, in my opinion, no contract by the mother to ratify. This is the part of the case I liked least. It was nothing more or less than an attempt to make the effort on the part of a worried mother to put an end to litigation evidence that she ratified a contract which, so far as she was concerned, never existed. Ratification implies the existence of something to

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ratify. I described the defendant as "worried." Indeed she was worried. Her letter of the 22nd April, from Ayr, is a pathetic description of the pitiful condition to which she was reduced by her inconsiderate son, and by the horse dealers who traded *with* him, but *on* her affection for him. I am of opinion that no twelve men, who fairly considered the evidence, could reasonably find a verdict for the plaintiff. This is indeed a curious case, and if Miss Somerville confers further lustre on literature and Roscarberry by bringing out another edition of her charming book, perhaps that most interesting writer may be induced to add a new chapter.

GIBSON, J. :-

The jury have found that defendant held out her son as her agent to buy a racer, not a stallion; and that she ratified the purchase. There was no question put as to whether Hugh was her agent in fact; it is admitted he was not, and the plaintiff's case rests exclusively on the estoppel founded on holding out. There was no direct representation of any kind made to plaintiff by defendant, and the holding out is based mainly on the sale of certain horses to the son, for which the mother paid. The dates of these transactions antecedent to the sale of Easter Boy are not accurately proved—which is to be regretted, as the idea that a mother, by paying for horses for a son, of fifteen or sixteen years of age when these transactions began, constituted him her general agent, is ridiculous as well as alarming. It is alleged that plaintiff was aware of four sales to the son at the time of the purchase of Easter Boy. Supposing that he was (and the evidence is doubtful, as the plaintiff at places appears to refer to statements made in Court at the first trial), Grey Star was bought for Hugh with the mother's authority for £25. Then came Faugh-a-Ballagh (when bought is not fixed), purchased for £129. Mr. Atkinson says three other horses, MacDonnell, Sullivan's horse, and Barry's horse were bought at other periods (not fixed) and paid for by Mrs. Irvine, but that these transactions were not known to plaintiff. In addition, however, to Grey Star and Faugh-a-Ballagh, Mr. Atkinson says that plaintiff was aware of the purchase of Diocletian for £100, and Lost Love for £45, both immediately before the transaction with plaintiff and, like the

latter, occurring when the defendant was in Scotland. For this last horse the defendant promised to send a cheque, and she was decreed after the first trial.

Do these purchases by the son, considering his age and the circumstances, supply evidence that Hugh was held out as her general agent to buy racers?

In *Foley* v. *Carden* (1) it was held that no multiplication of acts by a special agent would convert him into a general agent. If the defendant on each occasion had specially authorized her son to buy, there would be no general agency. Did the defendant, by buying and paying for Grey Star, constitute her son, then aged fifteen or sixteen years, her general agent? or had the purchase of Faugh-a-Ballagh shortly afterwards that effect? It is preposterous to suggest it. Nor can the purchase of Diocletian in defendant's absence and against her will vest in Hugh by estoppel authority to bind defendant. The only case of anything like authority is in the case of Lost Love, just before Easter Boy. Hugh, a headstrong and precocious boy, appears to have bought in his own name, but on a representation that he would get his mother to pay. Defendant paid, not as ratifying a purchase made on her behalf, but under the son's pressure. I do not think that her softness and indulgence in paying for horses without antecedent authority, can have a greater operation than if in each instance she had given special authority. The position is quite different from the acts of an employee who in the employer's absence is put forward to do certain acts in the course of business. There the recognition of such acts is evidence as to the scope of authority. Here there was nothing of the kind. Hugh was acting as son of a doting parent, and not as her agent with the right of binding her by contracts. In the absence of evidence of real authority, the doctrine of holding out requires caution in application. Nor is the plaintiff in the position of dealer who, having had several similar operations in which the mother had paid, might make the case that in his particular case the son was held out as duly authorized to buy Easter Boy. A weak mother was coaxed into paying various persons for horses which her son foolishly

(1) 4 New Ir. Jur. (N. S.) 195.

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bought. Her frame of mind is shown by her letter of April 22. It would be quite opposed to common experience and understanding that an extravagant boy, whose debts a parent had been induced to pay, should be supposed by that kindness to be turned into her general agent, with liberty to pledge her credit to any extent. It would be a most dangerous extension of the doctrine of holding out (explained by Lord Lindley in *Farquharson's Case* (1)) if such casual acts should be left to a jury as evidence of general agency. The actual transaction with plaintiff, as described by plaintiff, and as indicated in his letters to Hugh, points to a feeling on the part of the plaintiff that the mother was not legally bound. The son represented that Easter Boy was being purchased for stud purposes (which the jury negatived), and the plaintiff pressed for an assurance that the defendant would pay. The other parts of the case which I do not discuss in detail, such as the son's mastership of hounds, racing proclivities, &c., are quite insufficient to justify an inference that this boy or youth was represented as authorized to pledge his mother's credit *ad libitum* for horses or otherwise. Any value the topics possess would relate rather to actual authority (which has not been found) than to holding out. The plaintiff, who sold the horses to Hugh on his promise to get defendant to pay, acted imprudently, and he was not well advised in refusing to take back the animal, when defendant refused to adopt the purchase. I agree in my Lord's conclusion as to the alleged ratification; the conversation in Cork clearly referred to compromise, and was not an unconditional admission of ownership and authority. The defendant had no intention to ratify a contract which was then (*ex hypothesi*) not binding on her. Ratification is only required when the supposed principal (apart from ratification) would be free. To construe the interview as evidence of ratification or admission of liability would be quite contrary to the intention of the parties; if the defendant recognized that Easter Boy was hers, then, whether the plaintiff withdrew his proposal or otherwise, the defence she was relying on was gone. The conversation was conditional, and no jury could reasonably find that defendant intended any ratification or admission that the horse

(1) [1902] A. C. at p. 341.

was hers. She had refused to adopt the sale. Something had to be done with Easter Boy, and a settlement of the case was plainly desirable, though it was unwise for the defendant to go alone to such a negotiation.

The case has been twice tried. It is out of the question to send it to a third trial. Notwithstanding Mr. Atkinson's able argument, I think that no reasonable jury ought to find a verdict in plaintiff's favour. The cases he has cited are all distinguishable. They illustrate the importance of Lord Halsbury's caution against turning decisions on facts into authorities to govern, as matter of law, other states of fact bearing some general resemblance: see *Simmons's Case* (1); *Bass's Trade Mark* (2). The acts of a servant or agent in the conduct of his master's or principal's business are quite different in quality from what has been proved in this case. There must be judgment for the defendant.

KENNY, J.:—

It is admitted that there was no express authority proved in evidence from the defendant to her son to act as her agent. Furthermore, the evidence most strongly suggested to me that the plaintiff never dealt with the son as the defendant's agent, but as a principal in the particular transaction.

But did the defendant hold the son out as her agent? The principle laid down by Lord Wensleydale in *Dickinson* v. *Valpey* (3), and adopted by Lord Lindley in *Farquharson & Co.* v. *King & Co.* (4), is that the "holding out" must be to the particular individual who says he relied on it, or under such circumstances of publicity as to justify the inference that he knew of it and acted on it. In the latter case the House of Lords approved of the question left by the Judge at the trial, namely, "Did the plaintiffs so act as to hold the alleged agent out to the defendants as their agent to sell goods to the defendants?" On the evidence in the present case I cannot come to the conclusion that the defendant so acted as to hold out her son to the plaintiff as her agent to buy the horse in question.

(1) [1892] A. C. at p. 208.
(2) [1902] 2 Ch. at p. 581; [1905] A. C. at p. 443.
(3) 10 B. & C. 140.
(4) [1902] A. C. 341.

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As to ratification I am of opinion that the conversation relied on by the plaintiff was only as to a possible compromise, and that an intention to ratify could not be inferred.

J. L.

Appeal. June 11.

The plaintiff appealed (1).

Hon. Cecil Atkinson, for the appellant.

P. D. Fleming, K.C., and *A. M. Sullivan*, for respondent, were not called on.

THE COURT OF APPEAL dismissed the appeal with costs.

Solicitors for the plaintiff: *H. H. Barry & Son.*
Solicitors for the defendant: *Wright & Son.*

R. ST. J. C.

K. B. Div. 1906.

Oct. 29, 30. Nov. 16.

THE KING (CROGHAN) *v.* THE CHAIRMAN AND JUSTICES OF COUNTY MAYO (2).

Licensing law—Licensing (Ireland) Act, 1902 (2 *Edw.* 7, *c.* 18), *sect.* 2, *sub-sect.* 1—*Application for new license for premises forming portion of premises licensed at passing of Act.*

At the time of the passing of the Licensing (Ireland) Act, 1902, and up to the year 1905, J. held a publican's license in respect of two adjoining houses, both houses being included in the one license. One of these houses was held by J. as tenant of N. In 1905 J. surrendered this house to N., and obtained a renewal of the license in respect of the other house. N. having subsequently applied for a certificate for a new license in respect of the house surrendered to him:—

Held, that there was no jurisdiction to grant such certificate.

(1) In the Court of Appeal, before SIR SAMUEL WALKER, C., and FITZGIBBON and HOLMES, L.JJ.

(2) Before MADDEN and WRIGHT, JJ.

CERTIORARI.

Prior to October, 1885, there were two houses adjoining each other in the town of Claremorris, to each of which a publican's license was attached. One was the property of Michael Noone, and had been let by him to a Mrs. Minogue, who had obtained a transfer of the license, and carried on business as a publican down to October, 1885, when the license dropped. The adjoining house belonged to one William Judge, who carried on the business of a publican in it in his own name. In the year 1888, Mrs. Minogue surrendered the house held by her to Noone, who then let this house to Judge. Judge got the license previously held by him extended so as to cover the new premises so acquired. He made internal communication between the two sets of premises, and paid license duty on the combined valuations of the two houses as one license.

In October, 1889, on the death of William Judge, this combined license was transferred to Mrs. Ellen Judge, and she paid license duty on the combined valuations as one license down to October, 1905.

In March, 1905, Mrs. Judge surrendered to Noone the house held of Noone. In October, 1905, Mrs. Judge got a renewal of her license limited to the house originally belonging to William Judge. In April, 1906, Noone obtained from the Justices at Quarter Sessions a certificate for a publican's license in respect of the premises surrendered to him by Mrs. Judge. The prosecutor, a head constable of the Royal Irish Constabulary, obtained a conditional order for a writ of *certiorari* to bring up and quash this certificate, on the ground "that the said premises were not licensed within the meaning of the 2 Edw. 7, c. 18."

Cause having been shown against the conditional order by Noone, the present application was, on behalf of the prosecutor, to make the conditional order absolute notwithstanding cause.

The Solicitor-General (*Redmond Barry, K.C.*) (with him *Dudley White*), for the prosecutor :—

The question is whether the premises, for which Noone has obtained the certificate, were licensed at any time since the 1st January, 1902, so as to come within the exception in section 2,

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sub-section 1, of the Licensing (Ireland) Act, 1902. We submit they were not. What was licensed in 1902 was not this particular house, which formed only a part of the premises, but the entire premises consisting of the two houses combined: Licensing Act, 1872, s. 77, definition of "premises" and "licensed premises"; Licensing (Ireland) Act, 1902, s. 8; 17 & 18 Vict. c. 89, s. 12; *The Queen* (*Callaghan*) v. *Justices of Donegal* (1); *The Queen* v. *Raffles* (2). The policy of the Act of 1902 is to prevent the number of licensed houses being increased: *The Queen* (*Collins*) v. *Justices of Donegal* (3). If the contention on the other side is right, this policy would be defeated; the owner of licensed premises might split them up into a number of separate sets of premises, and a license could be granted for each set. Or, if a house were built in a yard included in the licensed premises, a separate license could be granted for such house. A construction should not be given to a statute which will destroy the object of it: *Salmon* v. *Duncombe* (4).

The Right Hon. J. H. Campbell, K.C., and *James O'Connor*, for Michael Noone:—

The house for which Noone seeks a license was licensed in 1902. Every portion of the premises included in a license is licensed. Premises must be either licensed or unlicensed—there is no *tertium quid*. If, therefore, the contention of the prosecutor, that this house was not licensed in 1902, is right, the absurdity would result that a sale of drink in it in 1902 would have been illegal. Moreover, the result of holding in favour of such contention would be that the owner of licensed premises could never restrict the area covered by the license, although by section 6 of the Act of 1902 express power is given to have such area extended. The same argument that is now urged against Noone's application could have been urged against Mrs. Judge's application in 1905.

As to the argument founded on the policy of the Act of 1902, that policy was merely to prevent increased facilities for the sale

(1) [1898] 2 I. R. 652.
(2) 1 Q. B. D. 207.
(3) [1903] 2 I. R. 533.
(4) 11 A. C. 627.

of drink. But the fact that licensed premises are divided into two does not necessarily increase such facilities.

Dudley White, in reply.

Cur. adv. vult.

Madden, J.:—

Nov. 16.

The question before us is the validity of a certificate granted by the Justices for the purpose of enabling Mr. Michael Noone to obtain a new license in respect of certain premises in the town of Claremorris. In granting the certificate the Justices purported to act under section 1, sub-section 2, of the Licensing Act of 1902, which excepts from the operation of the Act licenses granted to "premises which are now licensed, or which were licensed at any time since the 1st day of January, 1902"; and the question for our decision is whether the premises in respect of which the license was granted come within this exception.

It appears that prior to 1885 two adjoining houses in the town were separately licensed—one the property of Noone, the other of William Judge. Noone's house ceased to be separately licensed in October, 1885. Subsequently, in 1888, Judge acquired a letting of Noone's house, and obtained an extension of his license so as to cover both houses. After the death of Judge his widow became the owner of the premises so licensed, and paid duty on the valuation of the entire premises until October, 1905. She had, however, on the 1st March, 1905, surrendered to Noone the house of which Judge had become the tenant in 1888. Noone obtained, in April, 1906, the certificate, the validity of which is under consideration, entitling him to a publican's license in respect of the house so surrendered to him.

Can that house be correctly described as "premises licensed since the 1st January, 1902"? Licensed premises are defined by the 77th section of the Licensing Act of 1872 to mean "premises in respect of which a license has been granted and is in force." So long as the license is in force every part of the licensed premises is protected, and no part of the whole is unlicensed. But each individual portion, taken separately, does not, in itself, satisfy the description of premises in respect of which a license

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Madden, J.

has been granted. The license is granted in respect of the whole. The publican could lawfully sell drink in an outhouse, part of the licensed premises; but it would not be accurate to describe the outhouse as the thing in respect of which the license was granted. The policy of the Act has been explained in *The King* (*Collins*) v. *Justices of Donegal* (1). It is to prohibit for a limited period an increase in the number of licenses, subject to certain exceptions, one of which is in favour of an owner of licensed premises, who may find himself under the necessity of applying for a new license, and thus lose the benefit of *Clitheroe's Case* (2). I decline to extend the definition in the Act of 1872 so as to include in its meaning any particular part of premises in respect of which a license was granted. Such an interpretation would place it in the power of the licensing authority to defeat the policy of the Act by increasing the number of licensed houses. Reading the definition in its plain and ordinary meaning, I hold that Noone's house does not come within the exception in section 2, sub-section 1, inasmuch as the license was attached, not to it, but to the block of buildings of which it was part.

It has been suggested that Mrs. Judge was not in a position to obtain a renewal, inasmuch as there was a similar infirmity in her case, as she was the owner of a part only of the premises originally licensed. But this point is not before us; we are only concerned with the validity of Noone's license.

The conditional order must be made absolute.

WRIGHT, J.:—

Mrs. Judge, in October, 1905, got a renewal of the license for portion only of the premises previously licensed—that is to say, for her own house only—she having surrendered the other house to Noone, the former occupier of it.

In April, 1906, Noone applied for and got a new license for his house, under section 2 (1) of 2 Edw. 7, c. 18. There is no controversy as to the facts of the case, and it is certain that Noone's house formed part of premises which were licensed on the 1st January, 1902, the two houses being at that date covered by one license, and used as one.

(1) [1903] 2 I. R. 533. (2) I. R. 11 C. L. 412.

The contention put forward on behalf of the publican involves, if acceded to, the consequence that a house licensed at the qualifying date may be subdivided into two or more houses, and a new license granted in respect of each subdivision, without contravening the spirit or the letter of the Act. This would certainly be a serious consequence; and although the facts of the present case may be unusual, and not likely to recur, the principle contended for would be of general application.

The policy of the Act of 1902 is plain, namely, to prevent for five years from its date an increase in the number of licensed houses, and the mode of enforcing this policy is to be found in section 2, which enacts that from and after the passing of the Act no license shall be granted except in cases falling under one of three specified classes.

When premises are enlarged and a renewal is applied for, the question for the licensing Justices always is, Are the enlarged premises substantially the same as those previously licensed? (*R.* v. *Raffles* (1).) And this principle is adopted and applied in the decision of this Court in *The Queen* v. *The Justices of Donegal* (2). Where a licensed publican wishes to cut off portion of the licensed premises, and apply, as was done here by Mrs. Judge, for a renewal for smaller premises, no difficulty would arise; he is asking for no addition, no further privilege; he is restricting the area of the licensed premises; and the only question for the licensing Justices would be the suitability for the business of a publican of the premises thus diminished by portion being cut off. This, presumably, was proved to the satisfaction of the licensing Justices when, in October, 1905, Mrs. Judge obtained from them at Petty Sessions a renewal of the license for her own house alone, with the object apparently of paying duty on a smaller valuation, £7, instead of £12 10*s.*, as before.

The dropping of a license, which was in force in 1902, may occur from a variety of causes, and the Act, which aims at preventing an increase in the number of licensed houses, allowed in such cases an application for a new license, subject to all the objections which can be urged against such an application; but it seems to

(1) 1 Q. B. D. 207. (2) [1898] 2 I. R. 652.

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Wright, J.

me, not merely from the general policy of the Act and of the Licensing Code, but also from the language of the section, that a new license for premises, licensed when the Act passed, means a new license for the same premises, which means the same premises substantially, and does not mean that the original premises may be indefinitely subdivided, and a new license granted for each subdivision. To do so would be to use the Act for the purpose of creating a number of small shebeens.

Solicitor for the prosecutor: *Malachy J. Kelly.*
Solicitors for Michael Noone: *Kelly & M'Gonigal.*

J. G. T.

K. B. Div. Probate. 1907.

Feb. 4.

IN THE GOODS OF ELLISON (1).

*Probate—Will—Attestation—Signatures of witnesses in body of will—Acknowledgment by testator—Subscription—*1 *Vict. c.* 26, *s.* 9.

The attesting witnesses to a will (already signed by deceased) signed their names in a blank space left for the names of the executors in the body of the will, the testator having acknowledged his signature in their presence, and directed them to sign in the space where their names appeared:—

Held, on satisfactory proof that the witnesses had signed with the intention of attesting the signature of testator, that this was a valid subscription by the witnesses within the requirements of section 9 of the Wills Act, but that there was no appointment of executors, as the deceased had only acknowledged his signature in the will, and had not re-signed it after the witnesses had signed their names in the body of the will.

EX PARTE APPLICATION.

On November 14th, 1905, the deceased Robert Ellison called at the Royal Bank, Foster-place, Dublin, and having produced a will which purported to be executed by himself he acknowledged his signature in the presence of Frederick Roberts and Solomon Dale, both of whom were porters in the Bank.

(1) Before ANDREWS, J.

The instrument was (so far as material) as follows:—

"This is the last will and testament of me, Robert Ellison, of 10, Upper Sackville Street, in the county of Dublin, Ireland, November 14th, 1905. I hereby revoke all wills and testamentary documents heretofore by me made. I appoint to be the executors of this my will. I direct my executors to pay my just debts and funeral and testamentary expenses." [Then followed some pecuniary legacies.] "Signed, ROBERT ELLISON, 10 Upper Sackville Street, Dublin."

After a legacy to deceased's son there followed a regular attestation clause in printed form.

The deceased asked Solomon Dale and Frederick Roberts to sign their names as witnesses, pointing out to them the blank left for the names of the executors in the body of the will as the place where they should sign; and accordingly these two persons wrote their respective names and addresses in the space reserved for the names of the executors in the body of the will in the presence of the deceased and of each other. The witnesses did not sign their names underneath the attestation clause, nor did the deceased sign his name opposite the same.

The deceased died on January 5th, 1907, and Frederick Roberts died on January 13th of the same year.

This application was made to the Court on behalf of Frederick John Ellison, a son and one of the next-of-kin of deceased, for a grant to him of letters of administration with the will annexed of the deceased, or in the alternative for a grant of administration of the personal estate without in either event giving justifying security.

The sole next-of-kin of the deceased were the applicant and three others. These three other next-of-kin had signed a consent to the granting of the application.

Pim, for the applicant:—

"Subscribe" in section 9 of the Wills Act is not to be taken in its primary sense, and it is sufficient if satisfactory evidence is forthcoming to show that the witnesses signed the will with the intention of attesting it, the testator having acknowledged his

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signature in their presence. In this case Dale and Roberts have "subscribed" the will, for it does not matter where they signed if the Court is satisfied that they placed their signatures on the will meaning to attest it. They were requested by the deceased to attest it, and they both signed it in the place he pointed out, in his presence, with the intention of attesting it: *Roberts* v. *Phillips* (1); *In the Goods of Davis* (2); *In the Goods of Streatley* (3).

ANDREWS, J.:—

[After stating the facts as above.]

There is nothing in the Wills Act (1 Vict. c. 26) which prescribes the position of the signatures of witnesses to the execution of a will. The 9th section of the Act provides that the signature of the testator "shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall *subscribe* the will in the presence of the testator, but no form of attestation shall be necessary."

I would have had some difficulty in holding that "subscribe" did not mean "write underneath" were it not that this matter has been already decided. In *Roberts* v. *Phillips* (1) the question arose on the following words in the Statute of Frauds (29 Car. 2, c. 3, s. 5), "attested and subscribed in the presence of the said devisor by three or four credible witnesses." In that case the signature of one of the witnesses (William Bevan) was not *underneath*. Its position will be seen by referring to the *facsimile* of the end of the will which is given at page 460 of the report. The case was elaborately argued, and in the considered judgment of the Court given by Lord Campbell, C.J., his Lordship said (page 459), "The mere requisition that the will shall be *subscribed* by the witnesses we think is complied with by the witnesses who saw it executed by the testator immediately signing their names on any part of it at his request with the intention of attesting it."

This decision on the words I have referred to in the Statute of Frauds is applicable to the similar words in the 9th section of the Statute 1 Vict. c. 26, and it was followed and acted on in *The Goods*

(1) 4 E. & B. 450. (2) 3 Curt. 748. (3) [1891] P. 172.

of Streatley (1), by Butt, J., in the case of a will, the attesting witnesses to which had signed their names in the margin of the first and second sheets opposite to certain amendments. The Court allowed the question to be decided on motion, on account of the poverty of the estate, all parties consenting, and after argument Butt, J., stated that the authority of *Roberts* v. *Phillips* (2) did not appear to have been reversed, and allowed probate to go.

Having those decisions before me, I feel bound to hold that the will in question in this case was duly attested, although the signatures of the witnesses are in spaces which were left blank in the body of the will to be filled in with the names of the executors, as there is satisfactory evidence that the testator produced the will to these witnesses (Dale and Roberts), acknowledged his signature in their presence, and pointed out to them, as the places where they were to sign, the places where they thereupon did sign, and where their names and addresses now appear in the will. I shall, therefore, order that Frederick John Ellison, a lawful son and one of the next-of-kin of the deceased, be at liberty to apply for a grant of administration with the will annexed, for the deceased having only acknowledged his signature in the will, and not having re-signed it after the witnesses signed their names in the blanks, the will, though sufficiently attested, did not operate to appoint executors, and this will be stated on the face of the order.

Solicitor for the applicant: *John M'Padden.*

R. W. L.

(1) [1891] P. 172. (2) 4 E. & B. 450.

K. B. Div. Probate.
1907.
May 13.

In the GOODS of STRAHAN (1).

Will—Two paper writings—Probate—Grant to executors named in the two instruments—Practice.

Where probate was granted of two testamentary papers, as together constituting the last will of a testator, the grant was made to the two executors named in the first instrument and one executor named in the second instrument, the second executor named in the latter document having renounced.

Thomas Strahan made his will, dated October 26th, 1906, as follows :—"I give and devise all my estate and interest in the one half or moiety of the lands and the rents, issues, and profits thereof, in the townland of Dunamoy, County Antrim, now held by me jointly with one Thomas Strahan, at present residing in Philadelphia, to my daughter-in-law, Mrs. Selina Strahan, and I appoint Thomas M'Caughey and John Strahan executors of this my will."

There was no other bequest or devise contained in the will.

By a second will, dated the 27th February, 1907, Thomas Strahan dealt with a sum of £580 which had come into his hands since the date of his first will. The second will in no way revoked or modified the provisions of the first will. The testator appointed Thomas Strahan and James Caruth executors of the second will.

The testator, Thomas Strahan, died on March 3rd, 1907.

James Caruth duly filed a renunciation of probate on May 3rd, 1907.

Thomas M'Caughey and Thomas Strahan applied to the Court for an order declaring that the two wills of the deceased together formed his last will, and that a grant of probate thereof should issue to the applicants and John Strahan, three of the executors therein named.

(1) Before Andrews, J.

M'Cutcheon in support of the application :—

The two wills together constitute the last will of the testator, and there has been no revocation of the first appointment of executors by the appointment of additional executors in the second instrument: *In the Goods of Leese* (1) ; *In re Lloyd* (2). Both the papers are entitled to probate, and it is the practice to make the grant to the executors named in the different papers admitted to probate: *In re Morgan* (3).

ANDREWS, J. :—

In re Morgan (3) is clearly in point. I declare that the paper writings, dated October 26th, 1906, and February 27th, 1907, purporting to be the wills of Thomas Strahan, deceased, together constitute the last will and testament of the said deceased, and I give liberty to Thomas M'Caughey and John Strahan, who are named as executors in the said paper writing of October 26th, 1906, and Thomas Strahan, who is named as executor in the said paper writing of February 27th, 1907, to apply for a grant of probate of the said will of the said deceased.

Solicitors for applicants : *J. & A. Caruth.*

R. W. L.

(1) 2 Sw. & Tr. 442. (2) I. R. 6 Eq. 348. (3) L. R. 1 P. & M. 323.

K. B. Div. 1907.
June 13, 27.

MARGARET CANNING, PLAINTIFF AND RESPONDENT, SOUGHT TO BE CONTINUED IN THE NAME OF ROBERT M'FEELY, ADMINISTRATOR OF MARGARET CANNING, SINCE DECEASED; ROBERT FARREN, DEFENDANT AND APPELLANT (1).

County Court—Decree—Civil-bill appeal—Death of plaintiff (respondent) after notice of appeal—45 & 46 Vict. c. 29, s. 4—Continuing proceedings—Practice—Jurisdiction.

Where, after an appeal from a decree of the County Court Judge to the Judge of Assize, under 45 & 46 Vict. c. 29, s. 4, the appellant or respondent dies after notice of appeal, but before the hearing, there is jurisdiction in the Judge of Assize to adjourn the appeal to enable a personal representative of the deceased to be added to the record, and, upon this being done, there is jurisdiction to hear and determine the appeal.

CASE STATED at Lifford Spring Assizes, 1907, for the opinion of the King's Bench Division, pursuant to the statute in that behalf, by the Right Honourable Mr. Justice Gibson. The case set out as follows:—

1. This appeal was from a decree, dated June 19th, 1906, in a process issued by plaintiff for trover and money received. The defendant duly served and lodged a notice of appeal. The plaintiff died on July 6th, 1906. The appeal was duly listed for the Summer Assizes, 1906, and when the case was called, an order of adjournment, the plaintiff objecting, was made to enable the appeal to be revived. Administration was duly granted to Robert M'Feely on March 12th, 1907. For the plaintiff, Henry, K.C., appeared as counsel; for defendant, Law Smith, K.C., and Babington.

2. For the appellant the argument is that the right of appeal

(1) Before LORD O'BRIEN, L.C.J., PALLES, C.B., and ANDREWS, MADDEN, BOYD, and WRIGHT, JJ.

was not extinguished by death; that the principle "*actio Dei nemini facit injuriam*" applied; that there was jurisdiction to adjourn the appeal, to enable a personal representative to be added to the record to continue the appeal; and that since the Judicature Act and Rules an appeal could be revived even if there was no such jurisdiction before.

3. For the respondent the contention is that the right of appeal being statutory, and that there being no enactment enabling an appeal to be revived after death, an appeal was wholly lost by death, and could not be maintained whether such death occurred during the period allowed for appealing or at a later time before the appeal was listed; that the Judge of Assize had no jurisdiction to adjourn, an adjournment being a judicial act, as was held in the Crimes Act case, when an adjournment by one Resident Magistrate was held to invalidate a subsequent conviction pronounced in the case so adjourned; that there was no jurisdiction to entertain and adjudicate on an appeal where either of the parties had died, whether the cause of action was in contract or in tort; that there could be no revivor without express statutory authority; that no such authority existed before the Judicature Act, and that the Judicature Rules could not be applied to an inchoate County Court appeal.

4. The general practice has been, I believe, to treat an appeal to the Assizes as abated by death, and such appeal is struck out. The hardship of this is obvious, whether the effect is to leave the decision below standing, discharged from the appeal, or to leave such decision in suspense incapable of execution, which might be the result, at least when the appellant had given security to prevent execution. I am aware of no decision or practice in reference to the rights of the successful party under a decree or dismiss so circumstanced. Where the decree determines continuing proprietary rights it would be most unfortunate if the act of God should convert an appealed, and, perhaps, erroneous decision, into an irrevocable adjudication, binding all rights for all time. The difficulty has been attempted to be removed by legislation, but hitherto such attempts have proved abortive. The difficulty, whether an appellant or respondent dies, is much the

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same, save that in the latter case the representative of the deceased respondent would usually only be brought before the Court by order *in invitum*, and if there was no personal representative there could be no order. The death might occur (1) before appeal, during the four days; (2) after appeal, before the case was heard; (3) after the hearing, pending the decision, which might be adjourned for a special case or otherwise. In the first case there could hardly be an appeal. In the last, either a complete appeal having been domiciled in the High Court, the Judicature Rules might apply, or there might possibly be a remedy, if the Assize order could be antedated, in the names of the original parties, the adjournment being the act of the Court. The defendant asked me to state this case. I have added a third question, should the Court think proper to answer it, as, though it does not necessarily arise, it may enter into the *ratio decidendi*, and it is important for suitors to know their position. As there is a case of an appellant having died in a case listed at the present Assizes, I have extended the questions so as to cover such case as well.

The questions for the Court are:—

(1) Is there jurisdiction to adjourn when an appellant or respondent dies?

(2) Is there jurisdiction to hear and determine an appeal in a case so adjourned?

(3) If there was no such jurisdiction, is the order below in force and capable of execution?

Babington (with him *P. Law Smith, K.C.*), for the defendant:—

Since the Judicature Act, at all events, there is jurisdiction in the Judge of Assize to adjourn the appeal for the purpose of having a personal representative of the deceased raised, and to hear the appeal when this is done. The right of appeal given by 45 & 46 Vict. c. 29, sect. 4, is an appeal to the Judge of Assize as Judge of Assize, following in this respect the former statutory provisions as to such appeals from time to time in force, viz.:—2 Anne, c. 18 (Ir.), sect. 4; 36 Geo. 3, c. 25 (Ir.), sect. 29; 14 & 15 Vict. c. 57, sect. 127. By the Judicature Act (Ir.), 1877, the Judge of Assize constitutes a Court of the High Court of Justice: sect. 21 (8),

sect. 32. The Rules of the Supreme Court therefore apply, Order XVII., Rr. 1–3, of which provide that a cause or matter does not become abated by the death of a party if the cause of action survive, and give power to add the personal representative of a deceased party.

But even apart from the Judicature Act, or the Rules under it, there is such jurisdiction. The effect of the death of the respondent is not to put an end to the proceedings, but merely to suspend them: Pemberton on Revivor, p. 15; *Gregson* v. *Oswald* (1). In *Quigley* v. *Burmeister* (2), the respondent had died after notice of appeal was served, and FitzGerald, B., adjourned the case to enable administration to be taken out to the respondent. It appears that this was done, and the appeal afterwards heard and determined by Dowse, B.: *Burmeister* v. *Quigley* (3). In *Hemming* v. *Williams* (4), where the respondent died before the hearing of the appeal, it was held that this did not deprive the appellant of his right of appeal, and that the Court would proceed by analogy to the 166th section of the Common Law Procedure Act, 1852. In *Blakeway* v. *Patteshall* (5), where the respondent died, the appeal was ordered to stand over to allow of the personal representative of the respondent being added, and such personal representative was afterwards added by order of the King's Bench Division. See also as to the power to make an order although the proceedings are suspended: *O'Brien* v. *Bourke* (6); *Anon.* (7); *Nolan* v. *Fox* (8); *Gillen* v. *M'Veigh* (9). By sect. 4 of 45 & 46 Vict. c. 29, express power to adjourn the appeal is given to the Judge of Assize.

Section 136 of 14 & 15 Vict. c. 57, providing that on the death of any of several plaintiffs or defendants after lodging an appeal, leaving another plaintiff or defendant surviving, the appeal shall not abate, may be relied on by the other side as showing, on the principle of *expressio unius est exclusio alterius*, that on the death of a sole plaintiff or defendant the matter does abate. But all

(1) 1 Cox, Ch. C. 343.
(2) 12 I. L. T. 243.
(3) *Ibid.* 297.
(4) L. R. 6 C. P. 480.
(5) [1894] 1 Q. B. 247.
(6) Ir. Cir. Ca. 27.
(7) 1 C. & D. Cir. Ca. 268.
(8) *Ibid.* 549.
(9) 33 I. L. T. R. 111.

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that is intended by that section is that in such case the appeal may proceed without the necessity of taking out representation to the deceased party.

M'Loone and *Henry*, *K.C.*, for the plaintiff:—

The proceedings abated on the death of the respondent: Pemberton on Revivor, p. 2; *M'Keown* v. *Henry* (1); *Eccles* v. *Tughan* (2). The Legislature expressly specifies the cases in which there shall not be an abatement—viz., the bankruptcy of a plaintiff: 40 & 41 Vict. c. 56, sect. 64; or the death of any or several plaintiffs or defendants leaving another surviving: 14 & 15 Vict. c. 57, sect. 136. The case of the death of a sole plaintiff or defendant is not provided for, and, therefore, in such case, the proceedings abate. The effect of such abatement is, that the proceedings on the appeal come to an end, in which case the original decree or dismiss becomes final: 14 & 15 Vict. c. 57, sect. 133. The appeal referred to in that section is an effective appeal, and not merely lodgment of notice of appeal: *M'Keown* v. *Henry* (1).

The personal representatives of a deceased person clearly cannot originate an appeal. The right of appeal given by sect. 127 of 14 & 15 Vict. c. 57, was given to the person who thought himself aggrieved. In other sections of the Act, *e.g.*, sect. 142, where it is intended that a right given to a party shall extend to his personal representatives, they are expressly named. But in sect. 127 there is no reference to the personal representatives, and, therefore, the right of appeal must be taken as having been intended to be confined to the aggrieved party himself. 45 & 46 Vict. c. 29, sect. 4, does give a right of appeal to any class of persons who had not such right before. The form of recognizance to be entered into by the appellant (Form 31, Sch. C. of 14 & 15 Vict. c. 57) further shows that the right of appeal was intended to be limited to the original parties.

If the personal representatives of a deceased defendant resided in another county, they could not be added as parties, nor could execution be awarded against them on the hearing of the appeal: 14 & 15 Vict. c. 57, sect. 69: *M'Elroy* v. *M'Garrity* (3).

(1) 24 I. L. T. R. 103. (2) 30 I. L. T. R. 82. (3) 19 I. L. T. R. 38.

Hemming v. *Williams* (1) was decided on the English County Court Act and Rules, which are quite different from the Irish code.

Order XVII. of the Rules of the Supreme Court does not apply to the County Court: Judicature Act (Ir.), 1877, sect. 79.

[They also referred to *France* v. *Dutton* (2); *Foster* v. *Reeves* (3)].

P. Law Smith, K.C., in reply, referred to 14 & 15 Vict. c. 57, sect. 106; 27 & 28 Vict. c. 99, sect. 48: *Motion* v. *King* (4); *Ranson* v. *Patton* (5).

Cur. adv. vult.

June 27.

WRIGHT, J.:—

Under section 133 of the 14 & 15 Vict. c. 57, decrees and dismisses made by the Chairman, Recorder, and Assistant Barristers at Quarter Sessions, are absolutely final to all intents and purposes, in case there shall be no appeal therefrom. If an appeal is brought and heard, the decision on appeal, whether affirming, reversing, or varying the order appealed from, is the final order and that upon which execution issues. The question here is, Where notice of appeal has been duly served, and after service of such notice the sole plaintiff dies, is there an appeal alive or capable of being revived, or is the appeal dead? in which latter case the decree would be final under the section quoted (section 133).

The earlier provisions as to appeal are to be found in sections 127–130 of the same Act, now repealed by sect. 9 of the 45 & 46 Vict. c. 29. By section 127 the right is given to any person who shall think himself aggrieved by any decree or dismiss of the Assistant Barrister to appeal therefrom to the Judge of Assize at the assizes next after such decree or dismiss, and not after such assizes. Such Judge of Assize is empowered and required to hear the appeal, and to issue a decree and execution thereon, in like manner as decrees and executions are by the Assistant Barristers to be awarded and issued upon the hearing of civil bills under that Act. Under this Act it was early decided that a party could not appeal from a decree, however small in amount, in his own

(1) L. R. 6 C. P. 480.
(2) [1891] 2 Q. B. 208.
(3) [1892] 2 Q. B. 255.
(4) 29 W. R. 73.
(5) 17 Ch. D. 767.

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favour, and this was the settled practice until it was changed by the Act of 45 & 46 Vict. c. 29.

It was also clear under the early Act (14 & 15 Vict. c. 57) that there was no power to adjourn an appeal, and I have arrived at the conclusion that the section in giving the right of appeal to "the party aggrieved" meant a party, and an unsuccessful party, to the civil bill, whether plaintiff or defendant, and did not include a representative, executor, or administrator. The old Act (14 & 15 Vict. c. 57) gives power to one of several plaintiffs or one of several defendants to appeal, although the other or others of the parties, plaintiffs or defendants, refuse or decline to join in the appeal (sect. 135); and sect. 136 provides for the case of the death of one of several plaintiffs or defendants appealing, and leaving another plaintiff or other plaintiffs, or another defendant or other defendants, surviving, in which case the appeal does not abate, but may be proceeded with at the suit of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, as the case may be. The case of the death of a sole appellant, plaintiff or defendant, is left unprovided for by this Act, *i.e.*, no express provision or mention of such a contingency is made. The case of the bankruptcy of a plaintiff after action brought is provided for by the County Courts Act, 40 & 41 Vict. c. 56, s. 64; but the omission to provide for the case of the death of a sole appellant, plaintiff or defendant, although frequently occurring in practice, and proving a source of difficulty to Judges of Assize from an early time, still continued unprovided for by legislation, *i.e.*, no express provision was made for it.

The power to appeal was greatly extended by section 4 of the 45 & 46 Vict. c. 29, which enables any person dissatisfied with any decree, dismiss, or order, whether adverse to him or in his favour, to appeal to the Judge of Assize, and the section expressly declares the function and jurisdiction of the Judge of Assize. He is empowered and required to hear the suit or matter and to make such decree or order thereon and issue such execution in all respects as is empowered by the several statutes in that behalf by the County Court Judges to be awarded. He is to make the order which the County Court Judge, acting within his statutory jurisdiction, should have made. While this section extends the power

to appeal, so as to give an appeal against every order made by the County Court Judge, it does not enlarge the class who may appeal; it is still "the party dissatisfied," which, like the similar expression in the earlier Act, 14 & 15 Vict. c. 57, s. 127, "the party aggrieved," must in my judgment be confined to party to the action, and cannot be extended to a representative of a dead party. It would follow from this that if the death occurred within four days after the decree is made, and before notice of appeal has been served, under section 5 of 45 & 46 Vict. c. 29, no appeal can be taken. This event is clearly not provided for by statute.

Section 4 of 45 & 46 Vict. c. 29, expressly extends the power of the Judge of Assize—"He may on the appeal adjourn or remit the suit or matter back to the County Court Judge." This power to adjourn did not exist before. Under the Act of 1851 the Judge at the next assize was required to hear the appeal and make decree and issue execution. This express extension of jurisdiction of the Judge of Assize seems to me to be wholly inconsistent with the theory put forward during the argument that he had inherent jurisdiction, and was, at all events since the passing of the Judicature Act of 1877, clothed with all the powers of the King's Bench Division.

It is argued that by virtue of sections 21 (8) and 32 of the Judicature Act of 1877, a Judge of Assize is deemed to constitute a Court of the High Court of Justice, and in hearing appeals from the County Court Judge sits with all the authority and jurisdiction of the High Court, with, among others, all powers for continuing proceedings under Gen. Ord. XVII., Rr. 1–3, of the Rules of the Supreme Court. This seems to me to be wholly inconsistent with the Civil Bill Code, under which the appeal to the Judge of Assize is regulated; he is to make the order which the inferior tribunal should have made: see sect. 127 of 14 & 15 Vict. c. 57, and sect. 4 of 45 & 46 Vict. c. 29, already cited. It required the latter section to enable him to do anything more than to hear and determine the appeal. He could, if it seemed fit, adjourn or remit to the County Court Judge. If he has the powers of the High Court in hearing these appeals, he has all the powers, and it seems to me that to yield to this argument would be to change the character of an appeal under procedure already

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prescribed by statute, into a hearing under different Rules, different procedure, and far more extensive powers.

It has been further argued that the proceedings can be continued in the present case by virtue of the powers of amendment given by statute. The earlier powers of amendment are contained in sect. 106 of 14 & 15 Vict. c. 57, but are greatly extended by sect. 48 of the 27 & 28 Vict. c. 99. Power is by the latter section given to the Chairman; and the like, but no greater, power is given to the Judge of Assize on appeal, at all times to amend all processes, by adding or striking out parties, whether plaintiffs or defendants, and it is argued that under this section the representative of a dead appellant, plaintiff or defendant, can be inserted as a party in the place of the deceased. But this section, fairly construed, means, in my opinion, adding a party to a suit which is alive and has not abated by death, in which case, as a general rule, all proceedings are suspended until it is revived, if there be power to revive; it does not give power to continue proceedings.

This defect, or at the lowest this ambiguity or doubt, in the Civil Bill Act or Code was early discovered. We have been referred to early decisions or rulings of Judges of Assizes (made under the Act of 1851, 14 & 15 Vict. c. 57) which, with all respect, do not strike me as being very logical or satisfactory, for they clearly show, in some cases at least, that the Judge had considerable doubt as to his power to entertain the appeal at all, and yet, without purporting to decide whether he had such power or not, he made an order, generally a dismiss without prejudice and without costs, which he could only do on the basis that he had jurisdiction. We have been referred to a short note of a case of *Quigley* v. *Burmeister* (1), which was, like the present, a case of the death of a sole plaintiff, who had obtained a decree, after service of notice of appeal, in which Baron FitzGerald adjourned the hearing to enable a personal representative to the deceased to be appointed, and afterwards, this having been done, the appeal was heard and decided by Baron Dowse. But the question does not seem to have been argued, or, indeed, decided; no formal judgment was pronounced, and the note of the case is not very satisfactory.

(1) 12 I. L. T. 243, 297.

We have been also referred to the English case of *Hemming* v. *Williams* (1). In that case there had been judgment for defendant in an action of ejectment in the County Court. Plaintiff appealed to the Superior Court, the Queen's Bench; before the hearing of the appeal the defendant died. The Court of Queen's Bench, *in which the case then was*, held that the death of the defendant did not deprive plaintiff of his right of appeal, and that the Court would proceed by analogy to sect. 166 of the Common Law Procedure Act of 1852, and would allow plaintiff to proceed with the appeal after giving a notice similar to that required by that section. That decision simply applied to a case, rightly brought into their Court, the procedure given by their own Act. I do not regard this as any authority, or as giving any assistance upon the question before us.

I cannot think that the omission to provide for the case of the death of a sole appellant, plaintiff or defendant, under the Act of 1851 is a mere accident, having regard to the express provisions of sect. 136, dealing with the case of the death of one of several appellants. Subsequent legislation has provided for continuing proceedings in the case of bankruptcy. Several statutes—*e.g.*, the Act of 1864 (27 & 28 Vict. c. 99), Act of 1877 (40 & 41 Vict. c. 56), Act of 1882 (45 & 46 Vict. c. 29), and the Act of 1889 (52 & 53 Vict. c. 48)—are all silent on this subject, although the difficulty had long been felt, and it was well known that the practice of Judges of Assize differed. It was stated at the Bar that bills to remove this difficulty or doubt had twice been introduced, and had apparently not been proceeded with.

In a case of *Eccles* v. *Tughan* (2), heard on circuit by Mr. Justice Gibson, in which this point arose, he ruled that as the respondent had died he had no power to hear the appeal. In *M'Keown* v. *Henry, Executor of Carlisle, deceased* (3), on a similar state of facts, Mr. Justice Harrison, Judge of Assize, had made an order striking out the appeal. The plaintiff issued a new civil bill for a renewal against the executor of the deceased defendant, under sect. 142 of 14 & 15 Vict. c. 57, which the County Court Judge dismissed, and an appeal having been lodged,

(1) L. R. 6 C. P. 480. (2) 30 I. L. T. R. 82. (3) 24 I. L. T. R. 103.

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Mr. Justice Andrews reversed the dismiss, and granted a decree, laying it down in language expressly applicable to the present case that the appeal abated, that the decree was final until reversed (by the effect of sect. 133 of the 14 & 15 Vict. c. 57), and that the plaintiff was entitled to renew it against the executor of the deceased defendant.

I shall read one portion of the judgment:—"By the 133rd section of the 14 & 15 Vict. c. 57, every decree not appealed from is final to all intents and purposes, and is not capable of being reversed. I think it clear that it is final unless effectively appealed from. The lodgment of an appeal is a step towards obtaining a reversal, but does not of itself even stay proceedings upon the decree, and in the present case no security was given and there was no stay of execution. The decree remained in force, and was not capable of being deprived of its force and effect, save by reversal or variation on appeal. By the death of the appellant, pending the appeal, the appeal abated and became abortive. The appellant being a sole defendant, the case was not within sect. 136 of 14 & 15 Vict. c. 57, and there is no legislative provision for reviving or continuing the appeal. The only proceeding by which the decree could be reversed having then become irreparably abortive, I am of opinion that the decree remains in force, and that the abortive appeal had no effect upon it, and as it is now incapable of being reversed or varied, the plaintiff, who obtained it, is entitled to renew it under sect. 142 of the same Act against the executor of the deceased defendant." I adopt that view, and, in particular, the expression of opinion that the appeal referred to in sect. 133 means an effective appeal.

To revert for a moment to sect. 133 of the Act of 1851, which declares the finality of decrees and dismisses pronounced by the Chairman, "*in case there shall be no appeal therefrom*," these words, in my judgment, can only mean an effective appeal, not merely one commenced by service of notice of appeal, but an appeal continuing capable of being heard, and heard, whereupon the decision on appeal displaces the order of the Chairman.

If after service of a civil bill a sole plaintiff or sole defendant dies, it appears to be conceded that the action drops; there is no power to continue it, and a fresh civil bill must be issued, if the

cause of action survives. If a sole plaintiff or sole defendant dies after the making of the decree and before service of notice of appeal, it seems, too, to be clear that there is no power to appeal.

I have already pointed out that there is, at all events, no express statutory machinery provided for continuing proceedings where, after service of notice of appeal, a sole plaintiff or sole defendant dies.

We have been referred by Mr. Henry to sect. 69 of the Act of 1851, providing that no defendant can be sued or obliged to appear out of the division of the county in which he lives. Take the case of dismiss on merits against a sole defendant, and his death after service of notice of appeal by plaintiff, he (defendant) having appointed an executor living in Middlesex. What is to happen? How can this executor be made to appear? He cannot, except by violating the statutorily prescribed limit of the jurisdiction of the County Court, just referred to, that a defendant cannot be obliged to appear out of the division in which he lives. It would not, I think, be contended that he could be compelled to appear, and submit to the jurisdiction of the Court. How, in his absence, can a Court proceed to deal with, and if necessary get rid of, the dismiss made in favour of his testator?

These difficulties all seem to me to show that the present case has not been provided for by statute, and is not within the competence of a Judge of Assize, and that he, acting within limits prescribed by statute, cannot apply procedure or powers, either inherent in the higher tribunals, or conferred upon them by a long series of enactments.

I am of opinion (1) that there was no power to adjourn, (2) that there is no power to hear the appeal, (3) that the appeal having dropped, the decree is in force, and can be renewed by the executor of the plaintiff under sect. 142 of the Act of 1851.

LORD O'BRIEN, L.C.J.:—

The judgment which I am about to read is the joint judgment of the majority of the Court, consisting of, in addition to myself, the Lord Chief Baron, and my brothers Andrews, Madden, and Boyd. Each member of that majority is responsible, not alone

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for the result, but for each step of the reasoning which has led to it.

The important question in this case is the second, as, if there was jurisdiction in the Judge to hear the appeal, he had jurisdiction, under section 4 of the Act of 1882 (45 & 46 Vict. c. 29), to adjourn the hearing to the then next assizes. Thus, the question is, Has a Judge of Assize jurisdiction to hear an appeal in a case in which a sole plaintiff has died after the appeal has been duly taken?

We are of opinion that he has. The obligation to hear the appeal, imposed by that section upon the Judge of Assize, is expressed in the most general terms, and, *prima facie*, at least, applies to every appeal duly taken: "And the Judge of Assize is hereby empowered and *required* to hear *such* suit or matter." These unqualified words appear in a code, another part of which contemplates the possibility of the death of a sole plaintiff, or of a sole defendant, between the taking of the appeal and the assizes at which it is to be heard.

The enactment which declares the decree of the County Court Judge to be final does not apply to a decree so appealed against. Its words are—"Such decrees . . . shall, in case there shall be no appeal therefrom, be absolutely final . . . and shall not be subject to be removed by any writ of error . . . or capable of being reversed." In the event of an appeal, it is to the decree of the appellate tribunal that the character of finality is given:—"And in case of an appeal . . . the order or decree of" the appellate tribunal "shall in like manner be absolutely final" (14 & 15 Vict. c. 57, s. 133). Therefore, the decision in the case before us has passed out of its stage of finality as a decree of the County Court, and has not yet acquired that character by becoming that of the Judge of Assize. It is still inchoate or interlocutory, and is not such a final determination as is contemplated by the statute being made in every case, except that of a dismiss without prejudice, to which the statute in express terms gives a special character.

The recognizance on appeal of a defendant is to pay the sum decreed against him with costs, "in case no relief shall be had upon the hearing of the appeal"; and the condition of the recognizance (in Form No. 31 of Schedule C of the Act) is "that the

defendant do prosecute his appeal . . . at the next General Assizes, and shall pay such debt and costs as *shall* be awarded against him." These words of futurity point to a liability under the decree of the Judge of Assize, which is prospective, not to that of the County Court Judge, which is past.

Again, section 128 provides an appeal in certain events in which it is a necessary step that the money decreed shall be deposited with the sheriff; there is to be a recognizance "to abide the decree of the next coming Judge of Assize"; and, under section 131, a sheriff who neglects to pay over the amount "to the person entitled thereto" is made liable to pay double the amount. "The person entitled thereto" cannot be determined by anyone except the Judge of Assize, and unless the appeal can be heard notwithstanding the death of the plaintiff, the sheriff could keep the money indefinitely.

All these provisions show that the Legislature contemplated a hearing of, and an adjudication upon, every appeal, by the Judge. Thus, the verbal and grammatical construction of the words is in favour of the existence of the jurisdiction.

Further, this construction is necessary to give adequate effect to the intention of the Legislature. The mischief to be remedied was the possibility of an erroneous decision in the Court of First Instance; but such a mischief, if it exists at the institution of the appeal, must continue at the assizes, notwithstanding the death of any party; and in order to make the remedy co-extensive with the mischief, we are driven to the construction we have adopted.

In England, section 14 of the 13 & 14 Vict. c. 61, gave an appeal to "either party . . . who was dissatisfied with the determination of the County Court" on a question of law "to any of the Superior Courts of Common Law at Westminster"; and conferred on the Court of Appeal jurisdiction "either to order a new trial on such terms as it thinks fit, or to order judgment to be entered for either party, as the case may be," and to "make such order with respect to the costs of the said appeal as such Court may think proper"; and directed that such order should be final. It did not contain any enactment similar to our 136th section; but Rules made under the Act provided that the cause should not abate upon the death of one of several plaintiffs, or one of several

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defendants (1). Upon the construction of this Act, it was held, as far back as 1871, that the appellate jurisdiction continued, notwithstanding the death of a sole defendant: *Hemming* v. *Williams* (2); and this construction has since been uniformly adopted: *Blakeway* v. *Patteshall* (3).

The above considerations throw a tolerably substantial burthen on the plaintiff here, who insists that the jurisdiction does not exist. He endeavours to discharge that burthen by two arguments. Of these, the first is that the construction contended for would involve jurisdiction in the Judge of Assize to make a decree against a deceased defendant's personal representative (although he was not living within the jurisdiction of the County Court)—a jurisdiction which it is assumed could not exist.

It is hardly necessary to observe that this objection relates, not to the existence of jurisdiction, but to its exercise. In such a case the Judge of Assize might, if he thought fit, instead of deciding on the merits, dismiss the civil bill without prejudice, and thus prevent the decision appealed from operating as a bar to future proceedings. In truth, however, the objection has no foundation in fact. If a defendant, resident within the county, and duly served with the civil bill, change his residence between the service and the hearing by the County Court Judge, such change could not be contended to affect the jurisdiction which had already attached. So, too, a similar change in residence of the defendant between the decree and the hearing of the appeal could not affect the jurisdiction of the Judge of Assize, who, if he reversed a dismiss, might make a decree against the defendant—supposing him to be alive—although he was living in another county.

Now, if there be, as we hold there is, a jurisdiction to continue the proceedings against the representative of a deceased defendant, and if the representative is, as we hold him to be, in the same identical position as the defendant would have been had he continued to live, how can the fact of the residence of the representative out of the county oust a jurisdiction which would have

(1) Rules 198, 199, Pollock on County Courts, p. 153.

(2) L. R. 6 C. P. 480. (3) [1894] 1 Q. B. 247.

existed had the defendant, if alive, resided in the same place, out of the county? The jurisdiction of the Judge is (45 & 46 Vict. c. 29, s. 4)—"to make such decree or order thereon, and issue such execution in all respects, as is empowered by the several statutes in that behalf by the said County Court Judges to be awarded." If the County Court Judge could make a decree against a person resident out of his county, so can the Judge of Assize.

The jurisdiction to serve the process is limited by locality, but when there has been due service the execution issued is leviable throughout the entire of Ireland.

As to the argument which is rested on section 136 of the Act of 1851, we hold that that section was intended to facilitate, instead of obstructing, appeals. It shows that the presence before the Court, or even the existence, of a party vitally interested in the result, does not affect jurisdiction. In a civil bill against landlord and bailiff for an alleged illegal distress, on decree against and appeal by both defendants, the death of the landlord between appeal and assizes would not oust or affect jurisdiction. The utmost to which the argument can be pushed is that there is no *express* enactment that, on death of sole plaintiff or sole defendant, the appeal shall not abate; but the considerations we have already referred to are too strong to allow this circumstance, *per se*, to be a bar to the effectuation of the clearly expressed intention of the Legislature. A suit is not dead because it is abated. It is suspended only, and is capable of being revived by procedure; and when jurisdiction exists in a case in which apt procedure is not provided by statute, the Judge must himself mould a convenient form of procedure, as did the English Common Pleas in *Hemming* v. *Williams* (1). Many things can be done in an abated suit—as, for instance, payment of money out of Court. In appeals under our Act money may be lodged with the sheriff. This is tantamount to being lodged in Court, and its due disposal depends upon the decree of the Judge of Assize.

Upon the whole, we are of opinion that there is jurisdiction in the Judge of Assize to hear every appeal, whether there had been a partial or total abatement, and jurisdiction to decide it on its

(1) L. R. 6 C. P. 480.

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merits, and to give effect to his decision by directing the issue of execution. Questions 1 and 2 ought to be answered in the affirmative. Question 3 does not arise.

Solicitor for the plaintiff: *Joseph Loughrey.*
Solicitor for the defendant: *Philip O'Hagan.*

J. G. T.

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April 23.

CAMPBELL, APPELLANT; FINN, RESPONDENT (1).

Dealer in old metals—Purchase of brass under 56 lb. weight—Prevention of Crimes Act, 1871 (34 & 35 *Vict. c.* 112), *s.* 13—*General Dealers* (*Ireland*) *Act*, 1903 (3 *Edw.* 7, *c.* 44), *s.* 12.

The provision in section 13 of the Prevention of Crimes Act, 1871, and the schedule to the Act, imposing a penalty on a dealer in old metals who purchases brass in quantities of less than 56 lb. is not repealed by the General Dealers (Ireland) Act, 1903.

CASE STATED under 20 & 21 Vict. c. 43.

The appellant was charged before Mr. Drury, one of the Divisional Justices of the Dublin Metropolitan Police District, on a summons in which the respondent, a police constable of the Dublin Metropolitan Police, was complainant, for that at 16 Cork Street, within the said police district, he, being a dealer in old metals, did purchase a less quantity of brass than 56 lb. weight. The prosecution was brought under sect. 13 of the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112). At the hearing of the summons it was proved by the complainant that he visited the defendant's general dealer's shop at 16 Cork Street, and found an entry in the defendant's books, kept by the defendant pursuant to the provisions of the General Dealers Act, 1903, of the purchase of 8 lb. of brass which purported to have been purchased from Patrick Murtagh the day previously. The defendant showed the complainant the brass, and told him it was 8 lb. weight. The defendant made no attempt to conceal the facts, and stated to complainant he would test the case, as he believed he was acting

(1) Before LORD O'BRIEN, L.C.J., and KENNY, J.

within his legal rights. The defendant was licensed to carry on the business of a general dealer, under the General Dealers Act, 1903, on the premises at 16 Cork Street.

The magistrate found as a fact that the appellant did purchase a quantity of old brass of less than 56 lb. weight at his premises on the day in question, and, being of opinion that the provisions of 34 & 35 Vict. c. 112, were not expressly or impliedly repealed by the general provisions of the General Dealers Act, 1903, and that there was sufficient evidence before him to justify him in holding that the appellant was a dealer in old metals within the meaning of sect. 13 of 34 & 35 Vict. c. 112, he convicted and fined the appellant, but on the appellant's application stated the present case.

The Hon. Cecil Atkinson (with him *Moriarty, K.C.*), for the appellant:—

We submit that a dealer in old metals, referred to in sect. 13 of the Prevention of Crimes Act, 1871, now comes within the definition of "general dealer" in sect. 12 of the General Dealers (Ireland) Act, 1903, and that the effect of the latter section is impliedly to repeal the restrictions imposed upon dealers in old metal by sect. 13 of the Act of 1871, and to allow of the purchase of old metals by a licensed general dealer in quantities less than those prescribed by that section and the schedule referred to in it. Brass, such as was purchased here, is included in the expression "old metal," or "scrap metal" in the earlier part of sect. 12 of the Act of 1903. No doubt in the subsequent portion of the section, fixing a weight limit, brass is not expressly mentioned amongst the metals enumerated, but the main ingredient of brass is copper, which is mentioned in this enumeration.

[He referred to 57 & 58 Vict. c. 60, sects. 538, 539; *Mitchell* v. *Brown* (1); *Kelly* v. *Rice* (2).]

Dudley White, for the respondent:—

It is not necessary to consider whether, as regards copper and the other metals specifically mentioned in the 12th section of the Act of 1903, that section impliedly repeals the 13th section of the

(1) 1 E. & E. 267. (2) [1906] 2 I. R. 1.

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Act of 1871. I confine myself to the case of the purchase of brass. Brass is expressly mentioned in the schedule to the Act of 1871, as distinct from copper or its composites, but is not mentioned in sect. 12 of the Act of 1903. So far, therefore, as the purchase of brass is concerned, the provisions of the Act of 1871 must be taken to be unrepealed. A repeal by implication is only effected when the provisions of a later enactment are so inconsistent with, or repugnant to, the provisions of an earlier one that the two cannot stand together: *Kutner* v. *Phillips*, per A. L. Smith, J. (1); *Davies* v. *Harvey* (2); Maxwell on Statutes (4th ed.) p. 283.

Moriarty, K.C., in reply.

LORD O'BRIEN, L.C.J.:—

In this case, which has been very well argued, the question is whether the provision in section 13 of the Prevention of Crimes Act, 1871, so far as concerned with dealings in brass, is repealed by section 12 of the General Dealers (Ireland) Act, 1903. In my opinion it is not. If brass was within section 12 of the latter Act, I think the argument on behalf of the appellant should prevail. But I do not think it is. In the schedule to the Act of 1871, referred to in sect. 13, the word "brass" is expressly used. Sect. 12 of the Act of 1903 gives a specific enumeration of the articles within it. It enumerates a number of metals, viz., iron, copper, lead, zinc, and spelter, but, for what precise reason I do not know: probably it was a *casus omissus*; brass is not included. Nor in my opinion is tin included. Mr. Moriarty in his ingenious argument suggests that tin and zinc are identical. I do not agree with him in this; but at all events I am clear that brass is not within the section. So far as brass is concerned I am of opinion that the two sections can stand together, and that sect. 13 of the Act of 1871 is not repealed by sect. 12 of the Act of 1903.

We think therefore that the judgment of the learned magistrate was right.

KENNY, J., concurred.

Solicitor for the appellant: *J. R. Cresswell.*

Solicitor for the respondent: *Malachi J. Kelly.* J. G. T.

(1) [1891] 2 Q. B. 267, at pp. 271, 272. (2) L. R. 9 Q. B. 433.

THE KING (AT THE PROSECUTION OF JAMES KENNEDY AND OTHERS) *v.* CYRIL E. BROWNE, AUDITOR OF THE LOCAL GOVERNMENT BOARD (1).

K. B. Div. 1907. April 25, 26, 29, 30. May 9.

District Council—Labourers Acts—Contracts—Employment of solicitors—Audit—Local Government Board Auditor—Surcharge—Illegal or unfounded payments—The making, or authorizing the making, of payments—Negligence or misconduct—Persons accounting—Local Government (Ireland) Act, 1871, *s.* 12—*Local Government (Ireland) Act*, 1902, *s.* 20.

The Rural District Council of E., who had in hands a scheme for the erection of labourers' cottages under the Labourers Acts, by resolution directed that the council's solicitors should prepare bonds (which included agreements and warrants) for the contractors for the building of cottages and the fencing of plots. In pursuance of this resolution the solicitors did prepare and had duly executed 113 sets of agreements, bonds, and warrants. The agreements were executed on a printed form, which the solicitors had prepared and got printed at their own expense, with blanks left, so as to render the form adaptable to each particular contract. Under former labourers' schemes, when the district of E. was under the control of the poor law guardians, a printed form of agreement or contract was used, and the blanks in the forms were customarily filled up by the clerk or his assistant without the aid of the solicitors. The solicitors furnished bills of costs, in which a charge of £2 2*s.* was made for the preparation and execution of these documents, and this sum (which was less than the scale fee) was allowed in each case by a Taxing Master of the High Court, to whom the bills were referred, and before whom the council were represented by an independent solicitor. Thereupon the council paid the solicitors the amount of their bills, including the foregoing items. When the accounts of the council subsequently came to be audited, the auditor disallowed 12*s.* in each case, being the proportion of the £2 2*s.* which he attributed to the preparation of the agreements, upon the ground that the employment of solicitors for the performance of purely clerical duty was unnecessary and the payment therefor unfounded, and he surcharged the councillors who authorized the employment of the solicitors with these sums, amounting in the aggregate to £67 16*s.* :—

Held, that there was nothing in the action of the council in employing their solicitors for the work in question to render the payment illegal or unfounded within the meaning of sect. 12 of the Local Government (Ireland) Act, 1871.

(1) Before LORD O'BRIEN, L.C.J., and GIBSON and KENNY, JJ.

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Held, also, that, so far as the councillors, who were merely parties to the resolution authorizing the employment of the solicitors, were concerned, there was no making, or authorizing the making, of a payment within the meaning of section 12 of the Local Government (Ireland) Act, 1871.

Held, also, that the employment of the solicitors was not negligence or misconduct within the meaning of section 20 of the Local Government (Ireland) Act, 1902.

Held, also (*per* Gibson and Kenny, JJ.), that the members who passed the resolution were "persons accounting," within the meaning of section 20 of the Local Government (Ireland) Act, 1902.

MOTION to make absolute a conditional order for a writ of *certiorari* obtained by the prosecutors, James Kennedy, W. Harding, J. Lynch (Barntick), D. O'Brien, J. Brennan, M. Lynch, P. Skehan, P. B. Sweeney, P. M'Donnell, T. Roughan, P. Flynn, J. Lynch (Kilcolumb), J. Frost (Tiermaclane), James Mungovan, T. Frost, T. Considine, T. Hannon, and T. M'Mahon, to bring up to be quashed disallowances and surcharges, dated the 12th February, 1907, made by the defendant, Cyril E. Browne, an auditor of the Local Government Board, in his audit of the accounts of the Rural District Council of Ennis, together with the reasons for such disallowances against the prosecutors of the sums of £60 12*s.* and £7 4*s.*, being portions of the sums paid to the solicitors of the council on foot of two bills of costs for work done under the Labourers Acts. Under the Ennis Rural District Labourers Order, 1903, the Rural District Council of Ennis caused advertisements to be published, inviting tenders for the building of twenty-eight labourers' cottages, and for the fencing of ninety plots acquired by them under the Order. There were separate tenders for the building of each cottage and the fencing of each plot, and such as were considered suitable were adopted at meetings of the council. The amount of the contract prices to be paid by the council for this work amounted to the full sum of £4274 12*s.* At a meeting of the council, held on the 12th October, 1904, at which James Kennedy, the first-named prosecutor, was chairman and the other prosecutors attended, the following resolution was adopted unanimously:—"That the council's solicitor prepare, with the least possible delay, bonds for the contractors for the building of the cottages and the fencing of plots of land under the above Order." The description "bonds" was intended to

include the agreements for the carrying out of the work in connection with the building of the cottages, as well as the bonds and warrants in connection with the same. In pursuance of instructions following on this resolution, the council's solicitor did prepare and did have properly executed 113 sets of agreements, bonds, and warrants, for the building of the cottages and the erection of the fences. Mr. F. F. Cullinan, solicitor, Ennis, acted as solicitor for the council until the 19th July, 1905, when he resigned, and Mr. John B. Lynch was thereupon appointed solicitor to the council, and had since acted in that capacity. Mr. Cullinan prepared a form of agreement for the building of the cottages, and another form of agreement for the erection of fences, which he had printed at his own expense, leaving the necessary blanks for the names of the contractor and his sureties, &c., so as to adapt them to each particular contract. After the preparation and execution of the several agreements, bonds, and warrants, the respective solicitors furnished bills of costs to the council, which included charges, in the case of each cottage and fence, of two guineas in respect of the agreements, bonds, and warrants. The council, in the proper form, referred the two bills of costs for taxation to the Masters of the High Court, and instructed an independent solicitor, Mr. Frederick G. Kerin, of Ennis, to attend on the taxation of the two bills of costs on their behalf. The two bills of costs were taxed by Master Tandy, Mr. Kerin attending, and by two certificates dated respectively the 29th March, 1905, and 9th February, 1906, the Master certified that the sums of £725 6*s.* 10*d.* and £110 14*s.* 2*d.* were due by the council on foot of the two respective bills of costs. The two respective bills of costs were paid on the 12th April, 1905, and the 14th February, 1906, respectively.

When the accounts of the council came to be audited by Mr. Browne, he disallowed two sums of £60 12*s.* and £7 4*s.*, made up of a disallowance of 12*s.* each on the 101 agreements contained in the first bill of costs, and 12*s.* each on the twelve agreements contained in the second bill of costs.

The following are copies of the certificates of surcharge :—

"PAYING ORDER No. 31 (LOANS ACCOUNT).

"The bill of costs paid on 12th April, 1905, to Mr. F. Cullinan, solicitor, includes 101 items of £2 2*s.* each, for the preparation and

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execution of contractors' agreements, bonds, and warrants. The duty, so far as concerns the agreements, consisted merely in filling the blanks on printed forms. Following the judgment of Mr. Justice Kenny (in *Athlone No. 2 R. D. C.* v. *Roscommon County Council* (1)), who laid down that when once a form of contract had been settled by a legal hand, no further professional aid whatever was necessary for the purpose of filling in the blanks on the printed forms, it is clear that the employment of a solicitor to perform this purely clerical duty is unnecessary, and the payment therefor unfounded. I allow on each item of £2 2*s*. a sum of £1 10*s*. for the costs in connexion with the bond and warrant of attorney, and I hereby strike out and disallow the sum of 12*s*. on each of the 101 items of £2 2*s*., being a total amount of £60 12*s*. (sixty pounds, twelve shillings), and I surcharge with the said sum of £60 12*s*. Messrs. James Kennedy, J.P., W. Harding, J. Lynch, Barntick; D. O'Brien, J. Brennan, M. Lynch, P. Skehan, P. B. Sweeney, P. M'Donnell, T. Roughan, P. Flynn, J. Lynch, Kilcolumb; J. Frost, Tiermaclane; James Mungovan, T. Frost, T. Considine, T. Hannon, and J. M'Mahon, who authorized the said employment, and I certify the said sum to be jointly and severally due by them.

"12*th February*, 1907. "CYRIL E. BROWNE, *Auditor*.

"NOTE.—In estimating the proportion of the comprehensive charge of £2 2*s*., which might be set down as costs in connexion with the warrant, I have followed the charges in a taxed bill of costs recently inspected by me.

"C. E. B. 12/2/'07."

"PAYING ORDER 87 (LOANS ACCOUNT).

"The bill of costs paid to Mr. J. B. Lynch, solicitor, on the 14th February, 1906, includes twelve items of £2 2*s*. each, for the preparation and execution of contractors' agreements, bonds, and warrants. I strike out and disallow as unfounded the sum of 12*s*. on each of these twelve items, being the proportion of said items chargeable for the agreements in each case, being a total of £7 4*s*. (seven pounds, four shillings), and I surcharge with the said sum of £7 4*s*. Messrs. J. Kennedy, J.P., W. Harding, J. Lynch, Barntick; D. O'Brien, J. Brennan, M. Lynch, P. Skehan, P. B. Sweeney, P. M'Donnell, T. Roughan, P. Flynn, J. Lynch, Kilcolumb; J. Frost, Tiermaclane; James Mungovan, T. Frost, T. Considine, T. Hannon, and J. M'Mahon, who authorized the employment of the solicitor in this connexion, and I certify the same to be jointly and severally due by them.

"12*th February*, 1907. "CYRIL E. BROWNE, *Auditor*.

(1) 1 New Ir. Jur. R. 264.

"NOTE—My reasons for this surcharge are the same as those fully specified in a certificate of surcharge in a similar case written on folio 11 of the ledger.

"C. E. B. 12/2/'07."

The persons so surcharged were the members of the council who were present at the meeting of the 12th October, 1904, and they were so surcharged because the auditor held that they had authorized the employment of the solicitors, which he regarded as unnecessary, as the work was purely clerical. James Kennedy in his affidavit said when he and the other councillors directed the employment of their solicitor for the performance of the work "we considered that it was necessary for the due protection of the interests of the ratepayers to have the agreement prepared in each case with great care and particularity, and in such a manner that it would be possible to enforce against any defaulting contractor and his sureties the legal liabilities that it was intended that they should incur in case of default by such contractor, and we are still of that opinion, and we then thought and still think that we would have incurred a very great risk if we entrusted the carrying out of this work to any other person than our solicitor, and that the assumption by our clerk of the performance of the duty of filling up of blank forms of agreement might lead to very serious miscarriages in the case of defaults in the case of the said contractors or any of them."

The affidavit further stated that the Taxing Master took into account the number of the agreements and the fact that they were in the same form generally, and the sum allowed for the bonds, warrants, and agreements was measured in consideration of this fact, and that the taxed costs of the bonds, warrants, and agreements would have been far in excess of the sums allowed in the several cases in question, if the procedure was adopted of preparing for every separate contract a separate bond, warrant, and agreement in its entirety. Had the latter procedure been adopted, the solicitors would have been entitled, for the preparation of each agreement, bond, and warrant, exclusive of outlay, to a sum of £4.

The grounds upon which the prosecutors sought the writ of *certiorari* were that the auditor had no jurisdiction or authority to surcharge them for having authorized or directed the employment

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of their solicitors to carry out the business in respect of which the surcharges were made; that the authorizing of the employment of a solicitor to carry out the business was reasonable and proper; that the question of the reasonableness and propriety of the employment in respect of which the surcharges were made, and the question of the remuneration for same, were fit and proper matters to be decided by the Taxing Master, and were so decided by him, and his certificate to that effect was conclusive on the question; and that the surcharges were made without, and in excess of, legal authority.

In an affidavit by way of cause, Mr. Browne, the auditor, said:—"I surcharged the amounts of the said disallowances on the prosecutors as being the persons who had authorized the employment of Mr. Cullinan and Mr. Lynch to prepare the agreements, and thus enabled Mr. Cullinan and Mr. Lynch to receive payments of the certified amounts of their said bills from the said Ennis Rural District Council. I did not surcharge the amounts of the disallowed payments upon the members who actually made the respective payments to Mr. Cullinan and Mr. Lynch, because I was aware that the production of the Taxing Master's certificates to the said Ennis Rural District Council duly entitled the said solicitors to enforce payments of the amount of such certificates, inasmuch as, if such amounts had not been paid, the said Mr. Cullinan and Mr. Lynch respectively could have proceeded to recover the said amounts. Moreover, I consider that the persons who authorized the employment of Mr. Cullinan and Mr. Lynch to prepare the agreements, had by the passing of the resolution to that effect left the Taxing Master no option but to allow the said solicitors their costs of preparing such agreements." In a further affidavit he said that, having had an opportunity of further examining the books and papers of the Ennis Rural District Council, he found that there had been in that district six schemes for the erection of labourers' cottages under six separate Provisional Orders, dated, respectively, May, 1885; September, 1887; June, 1889; October, 1890; March, 1893; and April, 1903. Under the first four schemes a printed form of agreement or contract with the building contractors was used, and the blanks in these forms were customarily filled in by the clerk to the Guardians of

the Ennis Union, or his assistant, and the execution of such agreements, or contracts, by the contractors was witnessed by the clerk, or his assistant, and no costs, so far as he could ascertain, were paid to any solicitor by the board of guardians in connexion with the preparation, completion, or execution of contracts or agreements, except a small sum for instructions, attendances, and outlay for stamps in reference to the stamping of the contracts or agreements, which after they had been completed were handed to a solicitor with instructions to have the same stamped. He was unable to find any form of agreement under the fifth scheme, viz. that under the Provisional Order of March, 1893; but he believed that the same forms were used.

The material portions of the two sections referred to during the arguments are as follows:—

> Local Government (Ireland) Act, 1871, sect. 12:—"Every auditor acting in pursuance of this Act shall examine into the matter of every account which is to be audited by him, and shall disallow and strike out of every such account all payments, charges, and allowances, made by any person, and charged upon the funds of any town, contrary to law, or which he deems to be unfounded, and shall surcharge the same upon the person making, or authorizing the making of, the illegal payment, and shall certify the same to be due from such person; and, upon application by any party aggrieved, shall state in writing at the foot of such account the reasons for his decision in respect of such allowance or surcharge, and also any allowance which he may have made," &c.
>
> Local Government (Ireland) Act, 1902, sect. 20 (1):—"At the audit of the accounts of any public body, the auditor shall charge against any person accounting the amount of any deficiency or loss incurred by his negligence or misconduct, or of any sum which ought to have been, but was not, brought into account by him, and shall, in any such case, certify the amount due from him."

Serjeant O'Connor, K.C., and *Matthew J. Bourke, K.C.* (with them *F. Cullinan*), for the prosecutors:—

This surcharge is illegal on its face. The ground it assigns is that the payment was unfounded. This ground is one of those mentioned in section 12 of the Act of 1871. The person whom that section makes liable for an unfounded payment is the person who made or authorized the making of it. But the auditor in his surcharge does not surcharge the person who made the payment,

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or who authorized the making of it. He surcharges the persons who authorized the employment of the solicitor. In doing this he acted outside the statute, and without any power whatever. The persons who authorized the employment of the solicitor could only be surcharged under section 20 of the Local Government Act, 1902, and such surcharge could only be made if there was a finding that these councillors had been guilty of negligence or misconduct. There is no such finding here. Therefore the surcharge is on its face bad.

On the facts the action of the councillors was unimpeachable. In directing the preparation of these building contracts, they acted rightly in requiring their solicitor to prepare them. They had the double guarantee, of his being a respectable and honest professional man, and of the fact that his charges would be submitted to the taxing officers, who, they were entitled to assume, would be competent and empowered to keep the remuneration within reasonable compass: *Wellby* v. *Still* (1). The contention of the auditor, that the employment of a solicitor was an authorization or the making of a payment, is quite untenable. In this code of statutes the expressions "payment," and "authorizing the making of payments," have definite technical meanings; and the Local Government Act, like the Poor Law Act, prohibits any officer from making a payment until it is first authorized by a resolution, or order of some committee, signed by the chairman and two members. That resolution, or order, is the authority to make the payment. It is a recognized and well understood expression in these statutes. If the argument at the other side were right, the auditor's surcharge should have been upheld in *Reg.* (*Duckett*) v. *Calvert* (2), but the reverse was held in that case, Palles, C.B., pointing out that the persons who authorized the making of the contract could not be surcharged as the persons who authorized the making of the payment: see also the judgment of Gibson, J., in *Reg.* (*O'Leary*) v. *Calvert* (3). A further serious objection lies to the surcharge, raising the important question whether the parties surcharged here are at all "accounting persons" within the meaning of sect. 20 of the Act of 1902.

(1) [1895] 1 Ch. 524. (2) [1898] 2 I. R. 511. (3) *Ibid.* 266.

These Local Government Acts, following in the train of the Poor Law Acts and Orders, imposed the duty of keeping accounts, and of accounting to the auditors, on certain officers of those bodies—that is on officers entitled to receive and disburse moneys—who are required to keep, produce, and vouch accounts of their receipts and disbursements: Local Government (Ireland) Act, 1902, section 22 (1), and Public Bodies Order, 1904, Articles 5, 31, and 32.

[They also referred to *Overend & Gurney* v. *Gibb* (1), and *Re Evans* (2).]

Ronan, K.C., and *S. L. Brown, K.C.* (with them *W. G. Gibson*), for the auditor:—

The payment by the council of the charges for preparing the agreements was unnecessary and extravagant, and was consequently an "unfounded" payment within the meaning of sect. 12 of the Local Government Act, 1871. It was clearly laid down by O'Brien, J., in *The Queen* v. *Calvert* (3), that such payments are within the section. His words, quoted with approval by Palles, C.B., in *The King* (*King-Kerr*) v. *Newell* (4), were: "I certainly am not inclined in the least degree to derogate from the authority of the auditor in cases of this kind, or to narrow his authority so that he could not under this head of 'unfounded' have the power to deal with all payments of an unnecessary or extravagant kind." Upon the definition of the expression "unfounded" given in these cases and upon the language accompanying the expression, the section can have no meaning, unless it applies a case of this kind where it is sought to surcharge persons who, by their action, made the subsequent payment inevitable. In *The King* (*Drury*) v. *The Dublin Corporation* (5), Palles, C.B., classifies the subject-matter of surcharges under four heads. The action of the prosecutors in employing a solicitor at all to do the work in respect of which the auditor surcharged, was "negligence or

(1) L. R. 5 H. L. 480.
(2) [1905] 1 Ch. 290.
(3) [1898] 2 I. R. 511, at p. 525.
(4) [1903] 2 I. R. 335, at p. 342.
(5) Specially reported and printed in pamphlet form by the L. G. B.

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misconduct" within the meaning of section 20 of the Local Government Act, 1902.

In the 9th edition of Glin's Public Health Act, p. 286, there will be found an extract from the *Times* newapaper of the 2nd June, 1870, containing a report of a case of *Reg.* v. *The Board of Works of Plumstead*, in which it was contended that if the auditor had power to call for information upon every item of expenditure, it would cripple the acts of the Board, because he might say in reply to that that certain works were not necessary. The Court (Blackburn and Mellor, JJ.) said, supposing the Board had a dinner under the old system, with champagne and rose-water, would not the auditor have power to inquire into such an item, or why should the auditor have power to call persons before him and to examine them? It was contended generally that the auditor had not power to control the expenses of the Board. He could not say that the expenses were improperly large. Why should the auditor assume that the Board had exceeded its power? The Court considered that all the expenditure was in the discretion of the auditor. If the Dublin Corporation had 1000 artizans' rooms to let, would it not be negligence or misconduct on their part to refer the preparation of the agreements in reference to them to a solicitor? The Ennis District Council had no right in the first instance to bundle all these agreements into their solicitors' offices, merely to fill up blanks in printed forms. It was in so acting that the wrong was done, for they rendered the council liable to charges according to the professional scale in each case: *In re Aiken* (1). That the auditor had undoubted authority to inquire whether they were right in employing a solicitor at all, follows upon the decision in the case of *Reg.* v. *Haslehurst* (2)—a case decided upon a section in England similar to sect. 20 of the Local Government Act, 1902.

[The judgment of Kenny, J., at *Nisi Prius* in *Athlone No.* 2 *Rural District Council* v. *Roscommon County Council* (3) was also referred to.]

(1) [1902] 1 I. R. 1. (2) 51 J. P. 645. (3) 1 New Ir. Jur. R. 264.

The Solicitor-General (*Redmond Barry, K.C.*) and *Chambers, K.C.* (with them *George C. Green*), for the Local Government Board :—

The persons who create the obligation are the persons who authorize the payment within the meaning of sect. 12 of the Local Government (Ireland) Act, 1871. Upon the question of whether there was negligence, you must apply the ordinary test whether a prudent man, acting in his own private business, would refer the preparation of these 113 agreements to his solicitor. They did nothing to protect the council from what afterwards occurred, and the amount charged and paid is outrageous. Under the two sections there was jurisdiction in the auditor to enter upon the inquiry he did enter upon, viz :—Under sect. 12 whether the payment was unfounded, and under sect. 20 whether the payment and the obligation to make the payment were negligently brought about.

It is submitted that members of a council, circumstanced as these prosecutors were, are "persons accounting" within the meaning of sect. 20 of the Local Government (Ireland) Act, 1902.

Cur. adv. vult.

May 9.

LORD O'BRIEN, L.C.J. :—

This is an important case, and though the action of the auditor, Mr. Cyril Browne, cannot in this particular instance be upheld, still the controversy which has arisen will not be destitute of public advantage. What is that controversy ? Certain members of the Council of the Rural District of Ennis employed their solicitor for the time being, Mr. Cullinan, to prepare certain agreements, bonds, and warrants in relation to the erection of labourers' cottages. The agreements were to constitute the contracts between the council and the building contractors, and the bonds and warrants were intended to secure the performance of the contracts. There were altogether twenty-eight cottages to be built, certain fences to be erected, and ninety plots to be acquired. The total contract price for cottages and fences was £4274.

The Council employed Mr. Cullinan to prepare these agreements, bonds, and warrants, or rather they referred them for preparation to their solicitor for the time being—their standing

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solicitor, Mr. Cullinan. Mr. Cullinan resigned after he had prepared a certain number of these agreements, bonds, and warrants, and was succeeded by Mr. Lynch; but I shall deal with the case as if there were but one solicitor, Mr. Cullinan, throughout, as the circumstances in relation to him and Mr. Lynch are identical. The resolution passed by the council was as follows:—"That the council's solicitor prepare, with the least possible delay, bonds" (which meant agreements, bonds, and warrants) "for the contractors for the building of the cottages and the fencing of plots of land under the above Order" (Ennis Rural District Labourers Order, 1903). The facts as to the contracts, as to what was to be done by Mr. Cullinan, and as to the action of the auditor are all set out in the affidavit of Mr. Kennedy, the chairman of the Ennis Rural District Council. Mr. Cullinan did the work and sent in his bill of costs, which was referred by the Council to Master Tandy; and on taxation the Council were represented by an independent solicitor, Mr. Kerin. The costs were taxed to a certain amount—a very considerable sum indeed—and when subsequently the Local Government audit took place, the auditor allowed the costs for the bonds and warrants, but disallowed a sum of 12*s.* for the agreements, as he thought that there being so many of them they should be taxed on a mere scrivenery scale; and the sum he disallowed he surcharged against the applicants, the members of the Ennis Rural District Council.

As far as I can understand, the auditor purported to proceed under the 12th section of the Local Government Act, 1871, though I think the 20th section of the Local Government Act of 1902 was principally relied upon at the bar in sustainment of his surcharge. However, I will deal with both sections.

It is argued that the applicants authorized an illegal payment within the 12th section of the Act of 1871. I am clear that they did not do so. A contract to have work done—a reference to a solicitor to prepare agreements, bonds, and warrants is, in my opinion, most certainly not an authorization to pay, within the meaning of this section. This has been already decided in the case of *Reg.* (*O'Leary*) v. *Calvert* (1). I entirely agree with what

(1) [1898] 2 I. R. 266.

my brother Gibson said in that case, and his *ratio decidendi* was very clearly expressed. He is reported to have said, "In my opinion, the only persons who can be surcharged are those making the illegal payment, or those directly authorizing payment out of the union funds over which they have control. . . . It is the custodian or controller of the money, by whose immediate act the payment has been illegally made or authorized, who alone is subject to the auditor's jurisdiction." This is the *ratio decidendi* of my brother Gibson, and in my judgment it is conspicuously correct. I emphasize the word "directly" and the word "immediate." Certainly there was no direct authorization here, nor any authorization of payment within the true meaning of the term "authorization." Entering into a contract for the doing of work that may, perhaps, be never done, and authorizing payment for the work when done, are certainly different things. To say that these two things are identical, that they are convertible in meaning because one may follow from the other, because payment may be the result of contract, is really to disregard the obvious meaning of the English language. Why, the practice and the various articles and Orders to which Mr. Bourke referred show that the persons who contract and the persons who authorize payment are different. Payments are generally made on the authorization of the chairman for the time being and two of the council, and not the general body of the council who may have made the contract. This view was manifestly entertained by the Lord Chief Baron, as appears from his observations in *Calvert's Case* (1). On the first ground, then, that the applicants did not authorize the payment within the meaning of the 12th section of the Act of 1871, I am of opinion that this surcharge cannot be maintained.

But a further question arises under the same section: Was the particular payment that was made an illegal payment? I think not. I see no illegality whatever in the contract between the council and Mr. Cullinan. There was no suggestion of fraud or collusion. All want of *bona fides* was more than once emphatically disclaimed. The contract between Mr. Cullinan and the council was a valid contract, infected with no illegality, no corruption, no fraud, no collusion, no *mala fides*. The costs were, as they were

(1) [1898] 2 I. R. 511.

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intended to be, taxed by an appropriate officer, a Taxing Master—by the responsible and paid official of the High Court, who was naturally accredited with the possession of competent knowledge and skill in the subject-matter; and on taxation an absolutely independent solicitor of high character attended on the part of the council. Under these circumstances, I think Mr. Cullinan was entitled to get the sum to which the costs taxed. The payment of this sum was not illegal, it was not contrary to law, or unfounded. No doubt if a payment is excessive, a surcharge can be made for the excess, that is to say if the excess is severable and is *ultra vires*, or made without statutable or legal sanction. *Newell's Case* (1) is an illustration of this. There the Lord Chief Baron, dealing with an allowance of excessive sums for expenses, says at page 343 of the report, "Wherever a payment is severable, where the portion in excess of the right can be, in law, severed from that within the right, the excess only is to be disallowed." Mr. Cullinan was within his right here in getting this sum, as there was a valid contract as regards him.

The Lord Chief Baron proceeded at page 344:—"Now, to deal with the payments actually in question here. It is not pretended that any statute has fixed the actual rule of the daily subsistence allowance; therefore the only amount legally allowable is a reasonable sum. The payment by the Corporation to any of its members or officials of any excess above this reasonable sum would be illegal." There is no illegality here that I can see as between the council and Mr. Cullinan.

I turn now to the 20th section of the Act of 1902. It is argued that the applicants, the members of the council, in entering into the contract they made with Mr. Cullinan, were guilty of negligence within the meaning of that section. I do not think so. The word "negligence" is associated in the section with the word "misconduct," and involves, I think, some element of moral culpability. A body such as the applicants are, I think, responsible only for *crassa negligentia*. Certainly, the standard of care exigible from them is not higher than what is exigible from the paid directors of a company. The degree of negligence which subjects such a body to responsibility is *crassa*

(1) [1903] 2 I. R. 335.

negligentia. See Lord Hatherley's judgment in *Overend & Gurney* v. *Gibb* (1). See also the judgment of Mr. Justice Kay in the case of *In re Faure Electric Accumulator Company* (2). "Mere imprudence" is not enough; "want of judgment" is not enough; "grave error of judgment" is not enough. Now, then, let me see where the alleged negligence is—where the *crassa negligentia* is. What did these members of the Ennis Rural District Council do? They referred in the case of these numerous schemes, the preparation of the contractual instruments, and of the securities for their due performance, to their standing adviser. In doing so they acted, as was more than once admitted, with entire good faith. The imputation of fraud and collusion was expressly disclaimed. They honestly believed in the propriety and necessity of so doing, as is so emphatically stated in the affidavit made by Mr. Kennedy, the chairman of the council. Where is the negligence in all this? Were they negligent—were they guilty of *crassa negligentia*—because they did not provide that a form of agreement, which was somewhere on their premises, which had been used some thirteen or fifteen years ago, of which they knew nothing, should be copied out by their clerk—that they ought to have referred the part of Hamlet to a clerk? I asked the Solicitor-General what did the auditor think should be done; what according to him constituted the negligence. The Solicitor-General answered that they should have split up the transaction, and that one part of it, viz., the agreement, should have been referred to a clerk for scrivenery purposes, but that the preparation of the bonds and warrants might rightly be referred to the solicitor, and that the council was guilty of negligence because they did not refer the part of Hamlet, the agreements, to their clerk. This appears to me an extreme and wholly untenable proposition. The council knew nothing of the excellent observations of my brother Kenny in the *Athlone Case* (3). They had not been formally circulated amongst these councils.

The Labourers Act of 1906, with its provisions as to utilizing forms, had not been passed. But was what the council did so wholly unreasonable as to justify an imputation of gross

(1) L. R. 5 H. L. 480. (2) 40 Ch. D. 141. (3) 1 New Ir. Jur. 264.

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negligence? So far from being, under the circumstances of the occasion—having regard to the date of the transaction and all the circumstances—unreasonable, I think what the council did was reasonable. They referred, without any fraud or collusion whatever, the preparation of the agreements, bonds, and warrants to their solicitor, a gentleman of competent skill and high character. His charges, according to the rule which existed, were taxable by a Taxing Master, a gentleman from his very position, as I have already said, accredited with the possession of competent skill and knowledge in such matters, to whom it was quite competent to tax the agreements as so many forms; see judgment of Mr. Justice Kekewich in *Wellby* v. *Still* (1). It was also competent for the board to appoint, as they in fact did, an independent solicitor to act for them on the taxation of the costs of the solicitor to whom they referred the doing of the work. Under these circumstances, where was the negligence of the members of the council? I do not think there was any negligence, gross or otherwise. I think the observations of Lord Alverstone in *The King* v. *Roberts*, reported in the *Times* of Monday, May 1st (2), entirely bear out the view I have taken as to absence of evidence of negligence.

This is sufficient to dispose of the case, but another topic was pressed by Mr. Bourke with much insistence. He contended that the members of the council who were surcharged were not "persons accounting" within the meaning of the 20th section of the Act of 1902, that that section applied merely to officers of the council who had to keep and pass accounts, to accounting persons in the ordinary sense of these words, and that the section was never intended to apply to persons who negligently or through misconduct entered into a contract such as was entered into here.

I own I was much impressed by this argument; but it was held in England, or rather I should say assumed, for the question was never directly decided, that similar, but not identical, words extended to such a case as this. My brethren are strongly of opinion that, if negligence or misconduct was established, this case

(1) [1895] 1 Ch. 524. (2) 71 J. P. 288; 23 L. T. R. 491.

would be within the 20th section, and, though I have much—very great—misgiving, I am not prepared at present, whatever further argument may do, to formally dissent from their view. However, they agree with me that neither misconduct nor negligence is established, and that on the whole case we must disallow the surcharge, and make absolute the conditional order.

But with reference to the auditor I desire to say that, in my opinion, it is perfectly clear that he acted throughout with absolute *bona fides*, with a conspicuous desire to do what was right, in a matter certainly not free from difficulty. The discussion which his action has given occasion to will, in my opinion, be fraught with public advantage. The Local Government Board, I may add, were, in my opinion, bound to come here to give us their views, and endeavour to uphold the auditor in what they believed he had rightly done. They have succeeded in maintaining their contention as to one question in the case, which was of cardinal importance:—That in a case such as this, if misconduct or negligence were established, the applicants, the members of the council, would be within the expression "persons accounting" in the 20th section of the Act of 1902. However, as I have already stated, we are of opinion that neither misconduct nor negligence is established, and that accordingly the applicants, the members of the Ennis Rural District Council, are not obnoxious to the section, and that accordingly the conditional order must be made absolute.

We are of opinion that the auditor should be reimbursed all such costs and charges as he has incurred in defending his surcharge, out of the rates of the Ennis Rural District, which the said council has power to make, and that the prosecutors in the *certiorari* shall also be paid their costs out of said rates.

GIBSON, J.:—

This application raises questions of unusual importance as to auditorial jurisdiction, particularly under the Act of 1902, the provisions of which come up now for the first time for judicial consideration. Fortunately the Labourers Act of 1906 and the regulations thereunder will prevent any such extravagant expenditure in law costs in future, but for the public protection in other

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cases, it is desirable to ascertain the limits of the auditor's jurisdiction, and I shall state my conclusions on the points argued. They are four in number:—

1. Does sect. 12 of the Act of 1871 authorize a surcharge on members of a council who have caused loss by entering into an extravagant and wasteful (but legal) contract?

2. If it does not authorize a surcharge in such case, can the present surcharge be supported by reference to the statute of 1902, sect. 20, if that section is applicable to the facts and reasons stated in the surcharge.

3. Does sect. 20 authorize a surcharge against members who have caused loss by negligence or misconduct in reference to an improper but legal contract?

4. Was such negligence or misconduct made out?

1. Section 12 of the statute of 1871 differs from the Poor Law Act in several material particulars. It creates a special right of *certiorari*, vesting in this Court a quasi-appellate jurisdiction by virtue of which, if the decision below is "erroneous" either in law or fact, the Court can reverse such decision: *Reg.* v. *Haslehurst* (1); *Reg.* v. *Newell* (2); *Reg.* v. *Roberts* (3). It extends *certiorari* to allowances, which previously were not the subject of *certiorari*: *Reg.* v. *Sheehan* (4). It enables the surcharge to be made against the person authorizing the illegal payment, in this resembling the English Act, 21 & 22 Vict. c. 98, but it says nothing as to negligence and misconduct, provided for in the English Act, 7 & 8 Vict. c. 101, sects. 32 to 35. The most exhaustive provisions as to audit are found in the English Public Health Act of 1875, sect. 247, which contains in one enactment the provisions of sect. 12 of our Act of 1871, and sect. 20 of our Act of 1902.

Does sect. 12 enable persons, who make an improper contract, imposing an unnecessary burthen on the rates, to be charged for the loss thereby caused? In *Calvert's Case* (5) O'Brien, J., expressed the opinion, adopted by Palles, C.B., in *Newell's Case* (2), that payments of an unnecessary or extravagant kind come within sect. 12. Now contracts to which, and to payments under which, objection

(1) 51 J. P. 645.
(2) [1903] 2 I. R. at pp. 341, 342.
(3) *Times*, May 1, 1907.
(4) [1898] 2 I. R. 683.
(5) *Ibid.* at p. 525.

before the auditor might be contemplated, may be of three kinds: (1) Contracts invalid and void, as *ultra vires* or otherwise illegal; (2) contracts which are voidable, *e.g.*, for fraud or corruption, but which bind till rescinded, and which, if acted on, cannot be rescinded; (3) contracts which are *intra vires* and legal, but which from their improvident character may cause loss. If unnecessary and extravagant expenditure is a distinct subject of jurisdiction under sect. 12, distinct from illegality proper, as Palles, C.B., expressly held in *Drury's Case* (1), it is argued forcibly that, as such expenditure usually takes place under a binding contract, if the parties who make the payment cannot be reached, those who made the wasteful contract must be answerable, as otherwise the remedial provisions of sect. 12 (covering *ex hypothesi* extravagant payments) would be *brutum fulmen*, and even persons guilty of fraud or corruption could not be got at so long as the contract was unrescinded. The use of the word "unfounded," the inclusion of allowances as subject of *certiorari*, and the mention of contracts in sect. 17, sub-sect. 2, might support this view. *Calvert's Case* (2) is, however, relied on by Mr. Bourke as conclusively deciding that where a contract is legally binding, neither the persons who pay under that contract, nor those who make such contract can be got at. There it was the persons who made the payment who were surcharged. The items were of two kinds. As to the first, payments under decrees, the disallowance was manifestly erroneous, as the debt was created by the decree, and whether the original contract was invalid or not, the decree was conclusive, the matter having passed *in rem judicatam*. The other items were payments under the same contract. Palles, C.B., held that the disallowance of these was erroneous, because the auditor had based his decision on the supposed existence of a valid gas contract, there being no such contract in fact. O'Brien and Johnson, JJ., decided that, as the contract had been adjudged to be valid and binding, the auditor could not surcharge payments under it. The case is mainly relied on for the passage in the Lord Chief Baron's judgment (at p. 520) that liability should be established in a substantive proceeding. I have some doubt whether his language (which occurs in the part

(1) 30th June, 1906—Special Report (2) [1898] 2 I. R. 511.

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of his judgment dealing with the payment of the decree) was intended to apply to the contract payments which he discusses later on as if within the auditor's jurisdiction. He does not base his decision in any way upon the view that, the electric contract being binding, payments under it could not lawfully form the subject of surcharge. My doubt is increased by the way the learned Judge refers to the point in *Newell's Case* (1). I have discussed this case on account of its supposed bearing on the question before us. I do not think it applies at all to sect. 20, which creates a wholly new subject of charge. Whatever view, however, be taken of *Calvert's Case* (2) and its effect, I do not think that under sect. 12, standing by itself, persons who make a contract authorize a payment within sect. 12, which seems to contemplate something like an immediate order. The contract originates the liability, but there is no debt till performance. The contract is not the direct cause of the payment. I can find no authority that the words "authorizing the illegal payment" of themselves, and apart from "neglect or misconduct," cover the initial contract as an authorization: *Cullerne's Case* (3). This, however, does not involve that persons who make payments under an improvident contract for which they were responsible, might not be charged.

2. Can this surcharge, which, if made only under sect. 12, would be invalid, be supported, if, on the facts and reasons stated in the surcharge, sect. 20 of the Act of 1902 would have supported the auditor's action? He has given his reasons for holding that the contract was unnecessary and extravagant and the payment thereunder unfounded, but he does not in terms find negligence or misconduct. The Court cannot go beyond the auditor's grounds of disallowance: *Reg.* v. *Street* (4); but the surcharge is not like a magistrate's order, and I believe that in many cases like the present, the Court in England has supported surcharges where negligence or misconduct was not specifically averred, but where the surcharge was based on facts and reasons imputing and grounding such a charge. What the Court has to decide on is the subject of the aggrieved person's complaint, and if the

(1) [1903] 2 I. R. at p. 343.
(2) [1898] 2 I. R. 511.
(3) 25 Q. B. D. 485.
(4) 18 Q. B. at p. 685.

surcharge shows that the auditor was in substance right, the Court ought not to be astute to overrule him on a question of form: *Reg.* v. *Knott* (1). It is not necessary now to decide the point in the view that I take, but I should be reluctant to give effect to a technical objection, if the facts in my opinion brought the case within sect. 20.

3. The most important point discussed was the effect of sect. 20 of the Act of 1902, which should receive the same construction as 7 & 8 Vict. c. 101, sections 32 to 35, and the Act of 1875, c. 55, sect. 247. Loss occasioned by negligence or misconduct is to be charged against the accounting persons; the liability is not restricted to persons who make or authorize illegal payments; it extends to officers by whose default in collection or otherwise loss is incurred: *Reg.* v. *Knott* (1); *Reg.* v. *Roberts* (2). Mr. Bourke contends that (1) the section relates only to officers, and he relies on the regulations of 1904 (Vanston, pp. 1668 to 1670), as showing that such restricted meaning is correct; (2) that it does not extend to valid contracts, any abuse in relation to which (he says) must be corrected by a suit.

As to the regulations, they are administrative rules made under sect. 22, and they cannot curtail the operation of the section. Why they are so much more restricted than the regulations of 1899 (Vanston, pp. 476, 501), and why those earlier regulations were all repealed, I cannot say. Why should members of a council not be included in "accounting persons"? They are trustees and have control over the public money. Are they to be immune, if, by fraud and corruption, they cause loss? This Court should follow the construction placed on identical language in England. In *Reg.* v. *Haslehurst* (3) and *Rex* v. *Dolby* (4) (both decided on 7 & 8 Vict. c. 101) there were valid contracts on which the public body could have been sued. In the former case, it was assumed, and in the latter it was decided, that a payment made under such contracts could be surcharged if the contracts were the result of negligence or misconduct. In both, the surcharge was on the person making the payment, he being, I presume, affected with knowledge or complicity. In *The King* v. *Roberts*, reported in the

(1) 15 L. T. (N. S.) 291.
(2) [1901] 2 K. B. 117.
(3) 51 J. P. 645.
(4) 66 J. P. 521.

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Times of May 1st, 1907, and in the Weekly Notes, p. 114, decided on the Act of 1875, sect. 247, extended to county councils by the Local Government Act, 1888, sect. 71, one of the surcharges was against the members of the Highway Committee who had accepted (in the opinion of the auditor improperly) tenders which were not the lowest. The decision of the auditor was reversed, but neither counsel nor the Court suggested that if in fact the tenders had been improperly accepted, the auditor would not have had jurisdiction to charge the committee. In *Rex.* v. *Dolby* (1) the members acted in persistent defiance of the Local Government Board and the auditor. In *The Attorney-General* v. *Tottenham Local Board* (2), where the auditor had surcharged certain members of the Board, Wickens, V.-C., considered that all those sanctioning the illegal contract could have been surcharged. If sect. 20 does not extend to such members, and sect. 12 does not apply to such members save where they directly order or make the illegal or forbidden payment, the real authors of the loss would escape scot-free as far as the auditor was concerned. *Cockerton's Case* (3), the cases of *Reg.* v. *Ellis* (4), and the judgment of Palles, C.B., in *Drury's Case*, on June 30th, 1906 (of which a special report has been supplied), all point in the same direction.

But apart from the above authorities, I can see no reason for excluding members from section 20, which deals with negligence and misconduct irrespective of illegality, which was already covered by section 12 of the Act of 1871. The two sections should be read together, and have the same effect as section 247 of the Act of 1875.

Unless contracts of a legal character causing loss from negligence or misconduct are excluded altogether from section 20, it seems to me that the delinquents primarily chargeable must be those by whose negligence or misconduct the contracts came into being. Why should such contracts be construed to be excluded? The validity of the contract, and the recovery of judgment thereon, cannot defeat the duty to charge those whose negligence or misconduct in making the contract is the direct cause of the

(1) 66 J. P. 521.
(2) 27 L. T. (N. S.) 440.
(3) [1901] 1 K. B. 322, 726.
(4) 3 New Ir. Jur. 266, 270.

loss. Contracts are of various characters, for public works (which are subject to special conditions) or contracts within the Order of December, 1904, section 22 (Vanston, p. 1668). If no legal contracts are within section 20, the enactment is deprived of most of its value, as illegal and excessive payments were already subjects of surcharge under section 12. A person who makes a payment under a binding contract in good faith, without knowledge of the misconduct originating it, would not be to blame; but why should those whose misconduct has been the *causa causans* of the loss, and who are trustees and administrators of the funds, escape liability as not being accounting parties?

Applicants' counsel argue that though negligence, &c., causing loss is the subject of the section, negligence or misconduct in connexion with contracts is such a difficult question that it cannot be supposed to have been entrusted to an auditor's decision. But, illegality, *ultra vires*, &c., which are just as difficult, are admittedly within his jurisdiction. If the auditor goes wrong, there is an appeal to this Court by *certiorari*. *The Attorney-General* v. *Tottenham* (1) is a good illustration. There the suit was brought to restrain improper expenditure in promoting a Bill in Parliament, and to make good £400 that had been spent thereon. The auditor had surcharged the persons liable. Wickens, V.-C., approved of his action, and expressed the opinion that others not charged were also liable: see also *Cockerton's Case* (2), and *Dyer's Case* (3).

The suggestion that section 19 (which refers to tenders, and enables the auditor to nullify certain contracts) indicates that section 20 could not be deemed to apply to contracts generally was answered by the Solicitor-General, who showed that the section was addressed to a special purpose not covered by section 20. The district council which forwards the tenders does not make the contracts, and is not properly an accounting body. Special provisions were necessary in dealing with such contracts, and in order to reach the members of the district council who had violated the statute. Section 20 is general, and is not confined to public works. I do not think that section 19 compels

(1) 27 L. T. (N. S.) 440. (2) [1901] 1 K. B. 322, 726. (3) [1902] 2 Ch. 768.

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the Court to place on section 20 a narrower meaning than the same words bear in the corresponding English legislation. I must decline to confine the beneficial operation of the section to subordinate officers, and exclude from its scope guilty principals by whose misconduct the ratepayers' money may have been squandered.

4. Assuming (as I hold) that members guilty of negligence or misconduct in reference to a valid contract causing loss might be properly charged, I decide that no such case against the applicants has been established. The members of the council were in a sense trustees, but their standard of duty and obligation can be no higher than that of paid directors, whose position has been settled by many recent cases. Such directors, acting within their powers, are only responsible for culpable breach of duty: *Re Faure* (1); *Overend & Gurney* v. *Gibb* (2); *Dovey* v. *Cory* (3); but mere imprudence or error of judgment is not enough: *Turquand* v. *Marshall* (4). The district council here were not lawyers, and knew nothing of the decision of my brother Kenny, on which the auditor relied. They put the business in the hands of their regular solicitor, not as a matter of contract, but in the ordinary course of his official duty; his bill was subject to the protection given by the Public Bodies Order, 1904, Article 24, namely, taxation. The Taxing Master could and, perhaps, ought to have largely reduced the bill of costs, as all the contracts were in a common form: *Wellby* v. *Still* (5). How can his error make the council negligent? Nor can I say that they were negligent in not binding a solicitor by a special contract reducing ordinary professional remuneration. Admittedly, the greater part of the work was solicitor's business, and it would be unusual to entrust the part of the transaction relating to contracts to their clerk. The council were not made aware that on a previous occasion some years before, the whole of similar business had been entrusted to the clerk—a course which receives support from the Act of 1906. *Re Evans* (6) bears on this point of special contract.

No case has been cited where trustees or directors have ever

(1) 40 Ch. D. at p. 152.
(2) L. R. 5 H. L. 480.
(3) [1901] A. C. 477.
(4) L. R. 4 Ch. at p. 386.
(5) [1895] 1 Ch. 524.
(6) [1905] 1 Ch. 290.

been held responsible under such circumstances as we have before us. Under 7 & 8 Vict. c. 101, sect. 39, and the Act of 1875, c. 55, sect. 249, solicitors' bills are to be taxed by the Clerk of the Peace, whose allowance is made *prima facie* evidence of the reasonableness, but not of the legality, of the charge. Where there has been no such taxation the decision of the auditor as to reasonableness and legality is final: *Reg.* v. *Hunt* (1). There is no such provision in our code. I am not, however, to be understood as holding that taxation under Article 24 (*supra*) excludes the jurisdiction of the auditor, where there has been illegality, neglect, or misconduct on the part of the employing body, such matters not coming within the Taxing Master's function.

If negligence or misconduct had been proved, I would hold that the auditor was entitled to reduce the amount of the taxed bills; and if his reduction had been even larger, I would not have been disposed to interfere with his decision.

I add a caution. An auditor's function is largely judicial, and where persons outside the ordinary ambit of audit are sought to be made liable for negligence, misconduct, or otherwise, they should get reasonable notice so as to enable them to be heard in their own defence. In the English Act 11 & 12 Vict., c. 91, sect. 8, this is expressly provided.

The auditor must get his costs, to which he has a statutory right unless the Court orders otherwise. It requires an extremely strong case to justify deprivation: *Prest* v. *Royston Union* (2). I know of only two cases where such an order was made: *Reg.* v. *Great Western Railway* (3), where the auditor, an attorney, had a direct pecuniary interest; and *Drury's Case* (4), a very exceptional type of case, where I concurred with much doubt. In this latter case, it will be observed, no objection was taken that the auditor's jurisdiction was ousted by reason of the existence of binding contracts regulating the rate of interest.

KENNY, J.:—

The Ennis Rural District Council are for the purposes of the Labourers' Cottages Acts the successors of the Ennis Board of

(1) 6 E. & B. 408.
(2) 33 L. T. (N. S.) 564.
(3) 13 Q. B. 327.
(4) [1898] 2 I. R. 527.

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Guardians, and during the past twenty-two years there have been six different schemes put in force by those bodies for the erection of labourers' cottages within the district. The last of those schemes—that of 1903—with which the present application is conversant is the first that the local body under the new name of the Ennis Rural District Council has undertaken. It was not by any means an unambitious project. It involved the erection of twenty-eight cottages and the fencing of ninety plots of ground. The total cost of the scheme was approximately £8950, of which £4274 12*s.* was applicable to buildings and fences. The legal expenses of the undertaking were stated to be £1481, and of that sum £237 6*s.* was paid by the council to its solicitors for the preparation and execution of the contractor's agreements, bonds, and warrants in connexion with the erection of the cottages and fences. The employment of a solicitor for this purpose was sanctioned by a resolution of the council passed on the 12th October, 1904, in the following terms:—"That the council's solicitor prepare, with the least possible delay, bonds for the contractors for the building of the cottages and the fencing of plots of land under the above Order."

The solicitor then acting for the council was Mr. Cullinan, and it would appear that, in order to carry out his instructions, he prepared a form of agreement, bond, and warrant—applicable to every case—with blanks for the names of the contractor and his sureties and the contract price, and got it printed. This form was used in the case of every contract—so that the only trouble of preparation the solicitor was put to was that of the one original form that constituted a precedent for all. There were 113 separate accepted tenders for the work, many of them being sent in by the same contractor; but, notwithstanding this, it seems to have been thought necessary by the legal adviser of the council that in the case of every accepted tender, whether for a cottage or a fence, there should be a separate contract signed by the contractor. Thus 113 distinct printed agreements were solemnly signed and charged for as separate independent instruments. Of these 113 agreements, 101 were prepared by Mr. Cullinan. He resigned in July, 1905, and Mr. John B. Lynch was appointed solicitor in his place. Mr. Lynch prepared twelve more agreements—using for

that purpose the printed form that had been provided by his predecessor, Mr. Cullinan. The two solicitors delivered their bills of costs, and a bulk charge of two guineas was made for the preparation and execution of the agreement, bond, and warrant in the case of each of the 113 accepted tenders. In other words, the cost to the ratepayers of this portion of the legal business amounted to the enormous sum of £237 6*s*. It being necessary to have the costs taxed, the Rural District Council appointed an independent solicitor, Mr. Kerin, to represent them on the taxation. We have had the bills of costs before us, and it appears that the Taxing Officer—Mr. Tandy—made no reduction whatever in the charges so made by the solicitors, and the taxed bills having been paid, the whole of this sum of £237 6*s*. has come out of the rates, and has been taken credit for in the accounts of the District Council for the years 1905 and 1906, which were audited by the Local Government Board Auditor, Mr. Browne. His surcharges on this audit are the subject-matter of the present application.

What the auditor has done is this:—He was of opinion, and has so stated in his certificate of surcharge, that the employment of a solicitor for the purpose of performing what he regarded as the purely clerical duty of filling up the blanks in the printed forms of agreement, was unnecessary and the payment therefor unfounded, and he therefore disallowed the sum of 12*s*. on each of the 113 sums of two guineas—making together the sum of £67 16*s*. He states that he measured the sum of 12*s*. by reference to a previous audit in a different district, from which he concluded that a sum of 12*s*. would represent the professional charge for such an agreement as those in the present case. This sum of £67 16*s*. he surcharged against the District Councillors who took part in the passing of the resolution of the 12th October, 1904, on the ground that they were the persons who authorized the employment of the solicitors.

The case made against the auditor's surcharge is, that it was considered necessary by the council, for the due protection of the ratepayers, to have the agreement prepared in each case with great care and particularity and in such a manner that it would be possible to enforce it against any defaulting contractor and his

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sureties. The affidavit of Mr. Kennedy, the Chairman of the council, further went on to state as follows:—"We are still of that opinion, and we then thought, and still think, that we would have incurred a very great risk if we entrusted the carrying out of this work to any other person than our solicitor, and that the assumption by our clerk of the performance of the duty of filling up blank forms of agreement might lead to very serious miscarriage in the case of defaults in the case of the said contractors, or any of them." The affidavit added that, on the taxation of the costs, the Taxing Master took into consideration the number of the agreements, and that they were in the same form generally; and it further stated that the sum allowed for the bonds, warrants, and agreements was measured in consideration of that fact; and that, if the solicitors had demanded their full costs in every case, the amount, exclusive of the outlay, would have been £4, instead of the £2 2s. charged and allowed.

As to the propriety of the surcharge, the auditor states that under the former schemes of 1885, 1887, 1889, and 1890, a printed form of agreement was used, and that the blanks therein were customarily filled in by the clerk to the guardians or his assistant, and that the execution of such agreements by the contractor was witnessed by the said clerk or his assistant, and no costs were paid to any solicitor in connexion with the preparation, completion, or execution of the said agreements, except a small sum for instructions, attendances, and outlay for stamps. He says he was unable to find any form of agreement under the fifth scheme, that of 1893, but he believed that the forms were the same as those previously used.

These are the main circumstances under which this application comes before us. The case is an extremely important one in the interests of efficient and proper local administration. Several questions with reference to the statutory powers and duties of Local Government Board auditors and the character of the default or breach of duty in respect of which the applicants are liable to be surcharged, were discussed in the somewhat lengthened argument which took place before us. The powers of the auditor, with reference to surcharges, are contained in section 12 of the Irish Local Government Act, 1871, and section 20 of the Irish Local

Government Act, 1902. The former contemplates the disallowance of payments contrary to law, or which the auditor deems to be unfounded—and the latter, a deficiency or loss incurred by negligence or misconduct. The expressions "contrary to law" or "unfounded" have been held to mean the same thing as unfounded in point of law or unfounded in point of fact: *R.* (*Inglis*) v. *Drury* (1); and this head of "unfounded" has received the further interpretation as comprehending all payments of an unnecessary or extravagant kind: *Reg.* v. *Calvert* (2); *Rex* (*King-Kerr*) v. *Newell* (3); *R.* (*Drury*) v. *Dublin Corporation* (4). The first question, therefore, to be considered is, whether the employment and payment of a solicitor for the preparation of each separate agreement was unnecessary or extravagant within the Act of 1871, or was the loss arising from it due to negligence or misconduct under the Act of 1902? The other members of the Court have come to the conclusion that liability has not been incurred under either Act. After considerable doubt and hesitation I have formed the same opinion, but I confess to having arrived at it with great difficulty. It seems to me that the procedure which was good enough for the former board of guardians under the five previous schemes ought not to have presented insuperable difficulties in its repetition under the scheme of 1903, and it is a matter to be noted that under the rules for the carrying out of the recent Labourers Act of 1906, a printed form of agreement is scheduled, the blanks of which are to be filled up and its execution carried out by the clerk of the council without any legal assistance. If the members of the council who passed the resolution of October, 1904, were not at the time aware of the former procedure, such ignorance evinced a slender acquaintance with their duties. It is idle to suggest that they were not aware that numbers of labourers' cottages had already been built in their district under the previous Labourers Acts. None of them have deposed to ignorance on the subject. As prudent men they ought to have asked their clerk what had been done in the case of previous schemes. At the very least, one would have expected that

(1) [1898] 2 I. R. 527.
(2) *Ibid.* 511.
(3) [1903] 2 I. R. 335.
(4) Reported only in pamphlet form, specially printed for the Local Government Board.

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instead of giving their solicitor *carte blanche* in the matter of these agreements, they would have taken the precaution, if professional aid was at all needed, of directing that the solicitor should prepare one agreement, a copy of which might be used in every case.

Mr. Kennedy says the Taxing Officer took into account the number of agreements. I cannot think that he did, for he has not reduced the two guineas in each case by a single penny. Furthermore, no affidavit has been made by Mr. Kerin, who represented the council on the taxation of the costs, or by Mr. Cullinan, or by Mr. Lynch, that this argument in reduction of the amount was ever put before the Taxing Master, or that it was ever present to his mind. These considerations appealed strongly to me in the course of the argument, as indicating that the preparation by a legal hand was either extravagant or unnecessary, or was authorized through negligence. On the other hand, however, there is this to be said—Members of a council such as this, in the carrying out of their duties, are not to be placed in the same category as ordinary trustees. The standard of legal duty applicable to them is no higher, in my opinion, than that which is applicable in the case of directors of a company. Lindley, M.R., in *Re National Bank of Wales, Limited* (1), in dealing with the case of directors (at p. 671), says :—" If directors act within their powers—if they act with such care as is reasonably to be expected from them, having regard to their knowledge and experience—and if they act honestly for the benefit of the company they represent, they discharge their equitable as well as their legal duty to the company "; and (at p. 672) he adds, " The amount of care to be taken is difficult to define ; but it is plain that directors are not liable for all the mistakes they may make, although if they had taken more care they might have avoided them. Their negligence must be, not the omission to take all possible care, it must be much more blamable than that ; it must be, in a business sense, culpable or gross." Applying that measure of liability to members of the council here, I am of opinion that though the case nearly approaches the border line, I would not be justified in coming to a conclusion opposed to that

(1) [1899] 2 Ch. 629.

of the other members of the Court. I am much influenced by the disclaimer at the Bar of any imputation on the honesty and good faith of those gentlemen. They still take up the position that their action in employing a solicitor in each of the one hundred and thirteen cases was right and prudent. I am willing to attribute to them that they did not sufficiently consider what might be the results of their action, and that if they thought about results at all, they may have relied on the Taxing Officer to keep the solicitor's bill within reasonable limits. I think they ought to have made inquiries as to the procedure under the former schemes, and that they were imprudent in giving such a wide authority to their solicitor; but is this more than a serious error of judgment, as distinct from culpable negligence? I am willing to agree that it falls within the former category, and that under the circumstances the employment of the solicitor was not intended to, and did not of itself, involve an extravagant or unnecessary charge. Having formed this opinion, it would be unnecessary for me to say more, but I should like, notwithstanding the elaborate judgments of my Lord Chief Justice, and my brother Gibson, to add a few words as to the position and duty of an auditor. The argument that was addressed to us on behalf of the members of the council is one that, I think, should not pass unnoticed. It was this:—that the auditor has no power to surcharge in respect of negligence or misconduct, in connexion with contracts resulting in a legal liability to pay; and further, that the only persons who could be surcharged in respect of misconduct or negligence were officers of the local body, inasmuch as they, and they alone, were the "accounting persons" contemplated by the 20th section of the Act of 1902. It was also contended that the members passing a resolution such as that of October, 1904, could not be regarded as persons who "made or authorized the making" of the irregular payment within the Act of 1871, and in support of that contention the observations of Gibson, J., in *The Queen* v. *Calvert* (1), were relied on as showing that the authorization contemplated by the section was a *direct* one, by persons out of funds over which they have control. I

(1) [1898] 2 I. R. 268.

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do not wish to offer any opinion as to the correctness of this view, inasmuch as the case has been argued mainly on the effect of the Act of 1902, and the word "negligence" in its 20th section. Dealing with that section, I find that, substantially, it is taken from sect. 247 (7) of the English Public Health Act of 1875, and the latter has apparently been consistently administered on the assumption that not only might an accounting officer be surchargeable by the auditor, but also any member of the council, who, by his negligence, was a party to the incurring of a loss by the public body. My brother Gibson has referred to the authorities which recognize this interpretation. Countenance, no doubt, of a very serious character is given to the council's contention by the observations of Palles, C.B., in *The Queen* v. *Calvert* (1), who expressed the opinion that where a contract had been entered into, which, as between the members of the public body and the inhabitants, amounted to a breach of trust, the liability of the former should be established in a separate proceeding, and was not within the jurisdiction of the auditor. With the respect which is due to the opinion of the Lord Chief Baron, I must say I feel myself unable to agree. That was a case under the Act of 1871. If the doctrine of the Lord Chief Baron be correct, then *Reg.* (*Bridgeman*) v. *Drury* (2), where this Court supported a surcharge against members of the Dublin Corporation, would seem to have been wrongly decided. The surcharge there recognized the validity as between the Corporation and the contractor of the contract entered into between them. The expenses of the luncheon in that case were surcharged to the members who had made the payments to the caterer, while the latter's contract with the Corporation was not, and could not be, disturbed. But even if the Lord Chief Baron was correct in thus dealing with the Act of 1871, it seems to me that the section of the Act of 1902 is wider in its scope, and confers express authority for a surcharge in any case of negligence or misconduct, even where a binding legal contract, enforceable against the corporation, is associated with such negligence or misconduct. I consider that in the auditing of the accounts of a public body the members of the body are accounting parties

(1) [1898] 2 I. R. at p. 521. (2) [1894] 2 I. R. 489.

as well as the corporation and its officers. If the contrary doctrine were to prevail, one of the chief functions of an audit would be so shorn and restricted as to render its usefulness futile and ineffectual. I am glad to think that the expression of the Lord Chief Baron's opinion was unnecessary for the decision of the case before him, and may be regarded merely in the light of a dictum.

For the foregoing reasons I think the surcharges ought to be disallowed. At the same time, I think that there were strong grounds for the action of the auditor, and that he should get his costs.

Solicitors for the prosecutor: *Lynch & Lynch.*
Solicitors for the auditor: *D. & T. Fitzgerald.*
Solicitors for the Local Government Board: *T. T. Mecredy & Son.*

J. L.

PEARSON & SON, LIMITED, *v.* THE LORD MAYOR, ALDERMEN, AND BURGESSES OF THE CITY OF DUBLIN (1).

Engineering contract—Actionable deceit—Representations—Principal and agent—Fraud—Public Authorities Protection Act, 1893.

On appeal from the judgment of the Court of Appeal, reported *ante*, p. 82, the House of Lords reversed the judgment, and restored the judgment of the King's Bench Division, *ante*, p. 34, directing a new trial:—

Held, that the 43rd and other like clauses of the specification (relied on in the Court of Appeal) did not protect the defendants from liability.

Held, also, that the defendants, though innocently delivering the plans and specifications to the plaintiffs, could not escape liability for any fraudulent representations made by their agents therein. *Cornfoot* v. *Fowke* (6 M. & W. 358) explained.

Held, also, that the Public Authorities Protection Act, 1893, did not apply.

(1) Before LORD LOREBURN, C., THE EARL OF HALSBURY, and LORDS ASHBOURNE, MACNAGHTEN, JAMES OF HEREFORD, ROBERTSON, ATKINSON, and COLLINS.

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The Right Hon. J. H. Campbell, K.C., Danckwerts, K.C. (of the English Bar), and *E. A. Collins*, for the appellants.

Serjeant O'Connor, K.C., Ronan, K.C., Ignatius J. O'Brien, K.C., and *P. A. O'C. White*, for the respondents.

May 30.

LORD LOREBURN, C. :—

My Lords, this is an action for deceit brought by Messrs. Pearson & Son, contractors, against the Dublin Corporation. Inasmuch as I am about to propose that the case be remitted for a new trial, it is desirable that I should say no more than is necessary to explain my view.

The plaintiffs' case is, that they were induced to enter into a contract for the construction of certain sewage works by statements, made by and on behalf of the defendants, as to the existence to a depth of nine feet below Ordnance datum of an old wall. Undoubtedly evidence was adduced at the trial from which the jury might, if they thought right, conclude that the plaintiffs were so induced by statements made on behalf of the defendants. Also there was evidence for the jury, that those statements were made either with a knowlege of their falsity, or (which is the same thing) with a reckless indifference whether they were true or false, on the part of the engineers employed by the defendants to make the plans which were submitted to plaintiffs as the basis of the tender. And, had the case rested there, I gather that the Lord Chief Baron would have left the case to the jury, and that the learned Judges who subsequently had this litigation before them would have approved this course.

But another feature of the case was considered fatal to the plaintiffs' claim. The contract contained clauses, which I need not cite at length, to the effect that the contractors must not rely on any representation made in plans or elsewhere, but must ascertain and judge of the facts for themselves. And, therefore, the Lord Chief Baron withdrew the case from the jury. As I understand it, the view he held, in substance confirmed by the Court of Appeal, was that the plaintiffs, so forewarned, had no right to rely on any representation, and could not be heard to say they were induced to act on statements on which by contract they

were not to rely. Or, at all events, it was said that the defendants, being themselves innocent, are protected by such clauses against the consequence of contractors acting on false statements made by defendants' agents, however fraudulent those agents might be.

Now, it seems clear that no one can escape liability for his own fraudulent statements by inserting in a contract a clause that the other party shall not rely upon them. I will not say that a man, himself innocent, may not under any circumstances, however peculiar, guard himself by apt and express clauses from liability for the fraud of his own agents. It suffices to say that in my opinion the clauses before us do not admit of such a construction. They contemplate honesty on both sides, and protect only against honest mistakes.

Serjeant O'Connor and Mr. Ronan in their able arguments (and the arguments on both sides have been very able) make a further point. Thy say that though a principal is liable for the fraudulent representation of his agent, yet that rule only applies where the representation has, in fact, been made by the agent. I cannot accept that contention. The principal and the agent are one, and it does not signify which of them made the incriminated statement, or which of them possessed the guilty knowledge.

It is not necessary to say anything as to the Public Authorities Protection Act, for the Court of Appeal held that it did not apply to this case, and I am entirely of the same opinion.

I respectfully recommend to your Lordships that this case be sent for a new trial, and that the respondents pay the costs of this appeal and the costs in the Court of Appeal.

EARL OF HALSBURY:—

My Lords, I concur in thinking that in this case there must be a new trial, and for that reason I wish to say as little as possible on the merits of the case. The Chief Baron refused to leave the case to the jury upon grounds to be presently examined; but in the course of what I have to say I wish to point out at once that all I wish to affirm is, that there was evidence produced by the plaintiff which he had a right to have submitted to the jury. I do

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not assume that the jury would have found that fraud had been committed by anyone, still less do I propose myself to find fraud proved as a fact, but simply that it was a question which ought to have been submitted to the jury.

The sole question here appears to me to be that question.

It was an ordinary action for fraud causing damage to the plaintiff. Tenders were invited for a contract to execute certain work, and certain plans and specifications were held out to intending contractors as what I will at present call notices of what the work was intended to be. A contract was ultimately concluded upon the terms thus held out; and I may say at once that apart from the question of fraud there was nothing proved which could have called for an answer from the defendants. It is not necessary to go far in reciting the questions of fact.

The Chief Baron pointed out with great clearness how the question of fact arises, and it turns upon the existence or non-existence of a certain wall. It is not denied that the wall was represented on the plan as going 9 feet below the datum line, and the Chief Baron himself states that this statement was acted upon by the contractors so as to induce them to send in the tender at a less sum than they would otherwise have done for the execution of that contract. It is better, perhaps, to quote the Chief Baron's own words. His Lordship says :—"In result, then (and, as I have said, I have arrived at the conclusion with regret), I think that there was a statement contained in these plans which was, in fact, an incorrect statement. I think the result of that incorrect statement was, that the plaintiffs sent in the tender which was accepted, and which was for a sum much less than that for which they would have tendered if they had known the truth. But I am obliged to hold upon this 43rd section, together with the 46th, 47th, and 48th, which I won't occupy public time in reading, that taken as a whole, or rather, taking the plans as controlled by the specification, they do not contain a representation intended to be acted upon, that this structure penetrated 9 feet below Ordnance datum." It will be observed that the Chief Baron affirms both propositions—that the statement was inaccurate in fact, and that the tender was for a less sum than the contractor would otherwise have offered if he had known the truth.

The one point which led to the Chief Baron's judgment was, to use his own words, that the statement which he finds as a fact to be inaccurate does not contain a representation "intended to be acted on, that the structure penetrated 9 feet below datum line." With the sincere respect that I have for anything said by the Chief Baron, I cannot help saying that there is some confusion here. The words may be the subject of contract, and they may be so qualified or cut down by other words as to alter their primary meaning; but the intention with which words are used is the condition of mind of the person using them, and that is a question of fact to be ascertained by a jury. If one assumes that the statement is false and that it has caused a person to act upon it to his prejudice, the question whether it was fraudulently made by the person who made it may and ought to be decided by a jury.

But the learned Judge seems to think that the 43rd section of the contract removes it from being a question of fact for a jury, and that it becomes thereby a question of law for the Judge. I must say, notwithstanding my great respect for the learned Judge, I entirely differ from that view. The action is based on the allegation of fraud, and no subtlety of language, no craft or machinery in the form of contract, can estop a person who complains that he has been defrauded from having that question of fact submitted to a jury. I assume of course that there is evidence proper to be submitted to a jury, as in this case I think there was, and if I rightly understand the Chief Baron he would have submitted it to the jury but for the operation of that 43rd clause. I am wholly unable to understand why it was not proper to submit to the jury the question whether the answer given by the defendants' agents in respect of this very matter did or did not prove that the false statements contained in the plans were or were not fraudulently made, and if they were not intended to be acted on by the persons to whom they were made.

The witness Hellins, in the course of his evidence, stated that he and his assistants had prepared the plans and drawings, on behalf of the respondents, with the approval of Messrs. Harty and Chatterton, and in manner and design that had their consent and concurrence. The design of the plans was for the purpose of saving cost. He knew, when preparing the plans, that if a

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contractor had reason to believe that the wall was non-existing, his tender would be substantially increased, and that he would practically have estimated for a coffer-dam, costing £25,000. About £100, for a trial-hole, would have, at least, ascertained the existence of the foundations at any particular spot. The existence of the wall to a depth of 9 feet was the backbone of the scheme. The dotted lines were intended to convey a doubt as to the existence of the wall. At question 1493 the witness stated—"I had every doubt as to the existence of the wall. I had every doubt as to the exact depth, the exact shape, the exact character and the exact construction." At question 1630 he stated that he intended to indicate the North Harbour Wall as an existing wall running down to a depth of 9 feet below Ordnance datum. At question 1691 he says that the plans were designed to show a foundation of 9 feet below Ordnance datum, to be unknown and uncertain after that point. He further stated (questions 1687 and 1688) that the total of his information as to this wall is put forth in the letter of the 10th November, 1902, which contains every possible suggestion as to information. The operations therein mentioned took a week or ten days in April, 1895. Nothing had in fact been done with the direct object of ascertaining the facts; what witness now relied on was done for an express and different purpose of its own (question 1715).

The examination concluded with the following questions and answers—1723: "Do I understand you seriously to admit that at the meeting of the three engineers it was deliberately arranged that these plans were to be put forward to indicate what you have told us on the information you have mentioned? Certainly." 1724: "Am I right in saying your statement on the 10th of November is correct, that they were mainly influenced in that by the desire to have a cheap job? Certainly." 1725: "Was the object of this to induce the contractor to moderate his estimate? Certainly." 1726: "That is what it was intended for. The design was intended for that and deliberately designed in that way? Certainly. Deliberately designed, by agreement and arrangement? Certainly."

I do not understand the learned Judge to express any doubt as to the liability of the principals for the fraud of their agent—

if there was fraud: *Cornfoot* v. *Fowke* (1). If that case was supposed to decide that the principal and agent could be so divided in responsibility that the united principal and agent might commit fraud with impunity, it would be quite new to our jurisprudence. One of the learned Judges who decided this case of *Cornfoot* v. *Fowke* (1) explained it by saying that it was only decided on a point of pleading, and the other by saying that it was attempted to add a term to a written contract which was not in it. Whether these were satisfactory reasons, I do not care to inquire. It is enough to say that the case is not law if it is supposed to affirm the proposition to which I have referred. Mr. Justice Willes said that he would be very sorry to suppose that case ever decided anything but a point of pleading; and added, in *Barwick* v. *English Joint Stock Bank* (2), in delivering the judgment of himself and Justices Blackburn, Keating, Mellor, Montague Smith, and Lush :—" . . . the question whether the principal is answerable for the act of an agent in the course of his business—a question which was settled as early as Lord Holt's time —but in applying that principle to the peculiar facts of the case; the act which was relied upon there as constituting a liability in the sellers, having been an act adopted by them under peculiar circumstances, and the author of that act not being their general agent in business, as the manager of the bank is. But with respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong."

My Lords, we have, of course, nothing to do here with the question of damages, which could not be treated of till the questions now in debate have all been decided; but I do not think that the suggestion of one of the learned Judges can be maintained, that because the work is to be measured and valued, there could be no damage sustained by the contractor, if there were fraud. I think there is some misapprehension in the mind of the learned Judge as to the application of the agreement as to measure and value. It is, however, enough to say that we

(1) 6 M. & W. 358. (2) L. R. 2 Ex. 259, at p. 265.

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have nothing to do here with the question of damages. The sole question before your Lordships is, Was the Chief Baron right in withholding the question from the jury?

I cannot conclude without saying that I desire to associate myself entirely with the observations which have been made by the Lord Chancellor, that it matters not in respect of principal and agent (who represent but one person) which of them possesses the guilty knowledge, or which of them makes the incriminated statement. If between them the misrepresentation is made so as to induce the wrong, and thereby damages are caused, it matters not which is the person who makes the representation, or which is the person who had the guilty knowledge.

I concur in the motion of the Lord Chancellor.

LORD ASHBOURNE:—

My Lords, I concur in the opinion of the Lord Chancellor that the appeal should be allowed, and as that involves the grant of a new trial, I shall say as little as possible upon the merits of the case.

With the highest deference for the opinions of the Lord Chief Baron and the learned Judges of the Court of Appeal in Ireland, I am of opinion that the case should not have been withdrawn from the jury.

I think that there was evidence given at the trial upon which a jury might reasonably, if they thought proper, act in finding that the plaintiffs had suffered serious damage in consequence of the acts of the defendants or of their agents. The evidence went to indicate—(1) that the plaintiffs were influenced in making the contract referred to in the case by statements for which the defendants were liable, as to the existence of an old wall in an important position to the depth of nine feet; and (2) that those statements so made were false in fact, and were made by the engineers of the defendants, recklessly and without any real belief in the existence of the facts represented. It may be inferred from the evidence of Mr. Hellins that the false representations were of the highest importance, were calculated to deceive, and were intended to be acted on.

But the decisions of the Lord Chief Baron and of the learned

Judges in the Court of Appeal were not founded upon the opinion that there was no evidence fit to be submitted to the jury. They rested mainly upon the construction of the contract, whose 43rd clause provided that the contractors must not rely on any representations made in the plans, but must ascertain and judge of the facts themselves. The Lord Chief Baron laid it down that the contractor was "not entitled, in point of law, to say he acted to the extent of a hair's breadth upon the statement contained in the plans." I am entirely unable to concur in this view, and, with much deference to the opinions of the Lord Chief Baron and the learned Judges of the Court of Appeal, I cannot think, that in face of the evidence in the case, this clause 43 could be regarded as establishing a defence. Such a clause might, in some cases, be part of a fraud, and might advance and disguise a fraud; and I cannot think that on the facts and circumstances of this case, it can have such a wide and perilous application as was contended. Such a clause may be appropriate and fairly apply to errors, inaccuracies, and mistakes, but not to cases like the present.

The respondents' counsel argued their case with great acuteness, but they could not overcome the broad contentions they had to face that there was evidence for the jury, and nothing in the contract to prevent the jury fully considering that evidence.

I think the order suggested by the Lord Chancellor is correct.

LORD MACNAGHTEN :—

My Lords, I entirely agree in the motion proposed.

LORD JAMES OF HEREFORD :—

My Lords, I fully concur in the view expressed, that it is expedient not to express any opinion upon the merits of this case, which might influence a decision hereafter to be arrived at by another tribunal.

The question before your Lordships, whether the Chief Baron rightly removed the case from the decision of the jury, depends upon the answers to be given to one or two propositions.

Principally your Lordships have to determine whether evidence was given at the trial upon which a jury might reasonably act in

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finding that the plaintiffs had suffered damage in consequence of the deceit of the defendants or their agents.

With the most sincere respect for the judgment of the learned Chief Baron, I am of opinion that such evidence was given, and that the defendants were not relieved from the consequences of such deceit.

The defendants being desirous of carrying out some harbour works had to invite tenders for the necessary contracts. Certain information had to be afforded to intending tenderers. With this object, engineers, nominated and employed by the Corporation, prepared certain plans. I understand these plans were furnished by the engineers to the Corporation, and by the latter issued to applicants, of whom the plaintiff company was one. Upon those plans a very important wall was made to appear as existing 9 feet below Ordnance datum. It did not in fact run to such depth, and the defendants' engineers had no knowledge or reason to believe that it did. The representation appears to have been founded only on surmise. There is no doubt about the object of such false representations.

The evidence that was given in support of the view that the engineers had knowledge that they were making a false statement has already been quoted in the judgment of my noble and learned friend Lord Halsbury.

Now in the able arguments employed at your Lordships' Bar by counsel for the Corporation, it was not, in face of this evidence, contended that if the action had been brought against the engineer, there would not have been evidence of deceit, but certain replies were made to the *prima facie* case against the defendants. In the first place, it was said the plans were furnished by the engineers to the defendants, who are innocent of personal deceit. They passed the plans on, and so they innocently made the representation, not knowing of its untruth. The engineers, who knew of the nature of the representations, made no communication to the tenderers. I cannot admit the soundness of this argument. The engineers were employed by the Corporation, as their agents, to make the plans for the purpose of being communicated to the plaintiffs and others. In the course of this agency the alleged deceit was committed. Of course the

defendants did not personally test the accuracy of the plans, but when they passed them on they surely must bear the burden of their agents' conduct, and cannot repudiate the wrongful representations upon which they, to a certain extent, invited the tenderers to rely.

In the courts below this argument on behalf of the defendants was not accepted, and I concur in thinking that it cannot be maintained.

But the learned Chief Baron, whilst accepting the view that the plaintiffs had produced *prima facie* evidence of deceit, apparently removed the case from the jury upon the ground that clause 43 of the specification protected the defendants from liability.

Now the learned Chief Baron in respect of this clause expressed the opinion that the contractor was not entitled in point of law to say he acted upon the statement contained in the plans. He was told to act upon his own judgment, and ought to have done so.

If this dictum be read as general in its terms, and so applied, it may be read as conferring considerable advantage upon the designers of fraud. At any rate, by inserting such a clause, those who framed it would run a fair chance of the contractors saying:—"I assume that those with whom I deal are honest and honourable men. I scout the idea of their being guilty of fraud. An inquiry testing the plan will be expensive and difficult, and so I will not make it." The protecting clause might be inserted fraudulently, with the purpose and hope that, notwithstanding its terms, no test would take place. When the fraud succeeds, surely those who designed the fraudulent protection cannot take advantage of it. Such a clause would be good protection against any mistake or miscalculation, but fraud vitiates every contract, and every clause in it. As a general principle I incline to the view that an express term that fraud shall not vitiate a contract would be bad in law, but it is unnecessary in this case to determine whether special circumstances may not create an exception to that rule.

The defence raised under the Public Authorities Protection Act, 1893, was answered by the facts stated by the plaintiffs'

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counsel at the Bar, as well as by the judgment of the Chief Baron.

I, therefore, think that the appeal must be allowed, and the case sent for a new trial; costs being allowed in accordance with the Lord Chancellor's judgment.

LORD ROBERTSON:—

My Lords, I concur in the judgment proposed.

LORD ATKINSON:—

My Lords, I, like the noble and learned Lords who have preceded me, wish to guard myself against being supposed to express any opinion on the merits of this case, or upon the weight or credibility of the evidence to the existence of which I shall have to refer. I think there was abundant evidence given on behalf of the plaintiffs proper to be submitted to the jury, with a view to establish: first, that several of the maps and plans prepared by the defendants' engineers contained a representation that the North Harbour wall, the backbone of the scheme, as it is styled, went down to a depth of 9 feet below Ordnance datum; second, that this representation, as to a most material matter, was false in fact; third, that it was acted upon by the plaintiffs; fourth, that it was made by these engineers recklessly, without any real belief in the existence of the fact represented.

One Spencer Harty was the chief engineer of the defendants, and under one of the provisions of the contract, one Hellins was, on the 11th of December, 1899, duly appointed as Harty's representative, and put in charge of the works. These two gentlemen appear to have been associated in the preparation of the plans and specifications. I assume, for the present, as was held by the Lord Chief Baron, and both the Irish Courts, that the defendants are responsible for the acts of these officers of theirs.

In this state of facts it was the province of the jury to determine with what intent the representation was made. They would, from the fact that the representation was false, have been entitled to draw the inference that the persons who made it intended that it should be acted upon. But in addition there is,

in my opinion, in the testimony of Mr. Hellins, substantive evidence to show that these engineers intended that the representation should be acted upon. My noble and learned friend, Lord Halsbury, has already read the passage from Hellins' evidence (questions 1722 to 1726) which supports this view, and I need not repeat it.

It is clear from the portion of the evidence of this witness preceding the passage quoted, as well as from the contents of his letter of the 10th of November, that he is in this passage referring to the North Harbour Wall as shown on the plans. He had at an earlier part of his examination, namely, question 1630, apparently abandoned the contention, not persisted in in the Irish Courts, or before your Lordships' House, that the dotted lines on the plans were used to indicate not existing work below the surface, but work of the existence of which there was a doubt. And it is difficult, if not impossible, to see how the representation that this covered work existed could induce the contractor to moderate his estimate, unless he trusted in that representation and acted upon it. As I understand the Lord Chief Baron's decision, he withdrew from the jury the questions which it would *prima facie* have been the right of the plaintiffs to have left to them, not because there was not evidence given upon each proper for their consideration, but because he thought the plaintiffs had by their contract deprived themselves of the right to have the question as to the intention with which the representation was made submitted to the jury at all, had in effect contracted that they would not allege that any representation such as that in fact made was made with the intent that it should be acted upon, or that it had, in fact, been acted upon.

In commenting on clause 43 he expresses himself as follows :— "My clear opinion is that, with that statement in the specification, upon which the contractor was to make his tender, he is not entitled in point of law to say 'I acted to the extent of a hair's breadth upon the statement contained in these plans.' He was told he should act upon his own judgment, and satisfy himself as to the dimensions, levels, character, and nature of the existing works. And, I regret to say, that if he has not done that, but on the contrary has acted upon their statement, he is not

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entitled to recover upon that as a representation made with intent to be acted upon."

The rule of law thus laid down by the Lord Chief Baron would apply to any action for deceit founded upon the plans and specifications. He makes no distinction between conscious and unconscious fraud, such as is made by the Court of Appeal, a distinction which, if sound, would appear to me to amount to this, that the contractor should be held to have a cause of action for deceit if he was deceived by a deliberate lie, but no such cause of action if he was deceived by a false and reckless statement not really believed in by those who made it, though in law equally fraudulent, and equally valid as the ground of such an action. With all respect to the learned Judges presiding in the Court of Appeal, I think this distinction unsound, and as I understood, it was not insisted upon before your Lordships by the defendants' counsel in their able arguments. It would appear to me that a clause such as article 43, deliberately introduced into a contract by a party to the contract, designed beforehand to save him from all liability for a false representation made recklessly and without any real belief in its truth, is as much "conceived in fraud" and as much "part of the fraud" as if the representation had been false to the knowledge of the person who made it, because, to use Lord Bramwell's words in *Smith* v. *Chadwick* (1) :—"An untrue statement, as to the truth or falsity of which the man who makes it has no belief, is fraudulent; for, in making it, he affirms he believes it, which is false." If, therefore, the *direction* given to the jury is to be upheld on the grounds upon which it was purported to be based, it must, in my opinion, be, because these several articles of the specification on their true construction are to be held to embody a contract by the plaintiffs that they, in effect, are not, under any circumstances, to have a remedy by action for deceit for any fraud which may be practised upon them by the defendants, or by those acting on their behalf, in the nature of a false representation, that is a contract to submit to a fraud.

As at present advised, I am inclined to think, on the authority of *Tullis* v. *Jacson* (2), and *Brownlie* v. *Campbell* (3), that such a

(1) 9 A. C. 203. (2) [1892] 3 Ch. 441. (3) 5 A. C. 925, 937, 956.

contract would be illegal in point of law. And with the most profound respect for the Lord Chief Baron, I do not think that the articles of the specification relied upon can, on their true construction, be held to have had fraud, whether conscious or unconscious, within their purview or contemplation, or to apply at all to such a case of fraud as the present is alleged to be. They were, I think, intended to apply, and do apply, to inaccuracies, errors, and mistakes, or matters of that sort, but not to fraud whether of principal or agent or of both combined. I observe that the Lord Chief Baron refers to *Thorn* v. *The Mayor and Commonalty of London* (1), as an authority for holding, to use his own words, "that the object and effect of this clause (43) is to render the contractor a person who must depend upon his own knowledge, acquired by his own engineers"; but the action in that case was an action for breach of warranty, not for deceit. The contention of the plaintiff there was that, if a man "stipulates that work shall be done in a certain manner, he undertakes that it can be done in that manner," and the decision in effect was that no such undertaking is given by a stipulation of this kind. If the present action were founded on a warranty, expressed or implied, that the information given by the plans was accurate, or the works feasible, it may well be that article 43 would furnish a complete answer to the plaintiffs' claim, but that is an entirely different matter.

As I understand the argument addressed to your Lordships by the counsel for the defendants, they rested their case on grounds totally different from those on which the decision of the Court of Appeal was based. They did not rely upon the distinction between conscious and unconscious fraud at all, but contended that on a true construction of the contract incorporating, as it does, the plans and specifications, it was plain that the only representations made to the plaintiffs were made by the defendants themselves, not by their engineers, that it was admitted they themselves gave to the plaintiffs such information as they had, that they did so innocently, believing it to be true, that they did not warrant this information to be accurate, that

(1) 1 A. C. 120.

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they were, therefore, not responsible for the fraud of their engineers, if fraud there was, and that it was perfectly legitimate for them to protect themselves, as they contended that they had protected themselves, by this article 43 and the other articles referred to, and that they were, therefore, in point of law, entitled to the direction their counsel had asked for and obtained.

I do not think that this contention is sound. Indeed, Mr. Ronan was obliged to admit that if the defendants had authorized their engineers to communicate directly to the contractors the plans, and, therefore, the representations appearing on the face of them, his clients would, within the authority of *Barwick* v. *English Joint Stock Bank* (1), and the cases following it, have been responsible for the fraud of the engineers, thus made their agents; but that inasmuch as the plans had been supplied to the contractor by the defendants themselves, the engineers were not their agents to make any communication to the plaintiffs concerning them. But, by the terms of the contract, the engineers are expressly named as the persons to prepare the plans for the "use" of the contractor. The tender was to be based upon them. The work was to be carried out in accordance with them. The engineers were, therefore, by the express terms of the contract, constituted the agents of the defendants to draw up the plans which must of necessity be communicated to or supplied to the contractor. Both the engineers and the defendants must, I think, be held to have intended that the plans should be so communicated or supplied. The engineers were admittedly acting within the scope of their authority in preparing the plans, and forwarding them to the defendants, or to their committee, or their town clerk, for transmission to the contractor. The committee was simply the medium through which the plans were to be transmitted; they had no power to alter them in any way. And it would appear to me that the representations contained in these plans might under these circumstances be held, as a matter of fact, to have been made by the engineers to the contractors as truly as if the documents had been sent by the engineers to them, through the post, or by the hand of a messenger, I think, there-

(1) L. R. 2 Ex. 259.

fore, that the defendants are responsible for the fraud of their engineers in framing the plans, if fraud there were.

The only other point relied upon by the defendants on this appeal was that they were within the protection of the Public Authorities Protection Act, 1893, the fraud for which they were sued having been an act done by them "in pursuance or execution of a public duty or authority"; and that the action, which was only instituted on the 30th of July, 1904, over four years after the false representation had been made, and over three years after the damage had commenced to accrue, was late. The answer to that, upon the facts, is that where, as in this case, the damage is continuing damage, the period of six months does not under the express words of the statute commence to run until after the damage has ceased. Here the damage continued till the 27th of August, 1903, and on the 2nd December previous it was agreed between the plaintiffs and the defendants that the claims of the former in respect of the wrong now sued for should stand over till after the completion of their contract—an event which did not take place till the month of June, 1904.

The Lord Chief Baron decided, on the authority of *Sharpington* v. *Fulham Guardians* (1), that the making of a false representation, by which a person was induced to enter into a private contract with a public authority for the construction even of works authorized by statute, could not be held to be an act done by that authority "in pursuance or execution of a public duty," and that therefore the statute did not apply. The Judges of the King's Bench Division concurred, and the question was not dealt with by the Court of Appeal. Were it necessary to decide the point now, I should, for myself, be ready to concur in opinion with the Lord Chief Baron; but owing to the existence of the arrangement which I have mentioned, I think it is not necessary to decide it. On the whole, I am of opinion that the decision of the Court of Appeal in Ireland was wrong and should be reversed, and the judgment of the King's Bench Division affirmed, and that this appeal should be allowed, and the order as to costs suggested by my noble friend on the Woolsack made.

(1) [1904] 2 Ch. 449.

H. L. 1907.

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LORD COLLINS :—

My Lords, I agree (1).

After some discussion as to whether the King's Bench decision as to costs ought not to be adopted, the House of Lords made an order, the curial part of which is as follows :—

"IT is ordered and adjudged by the Lords Spiritual and Temporal in the Court of Parliament of His Majesty the King assembled, that the said order of His Majesty's Court of Appeal in Ireland of the 26th day of June, 1906, complained of in the said appeal, be, and the same is hereby, reversed, and that the order of the King's Bench Division of the High Court of Justice in Ireland of the 27th day of February, 1906, thereby discharged, be, and the same is hereby, restored: And it is further ordered that the respondents do pay, or cause to be paid, to the said appellants the costs incurred by them in the Court of Appeal, and also the costs incurred by them in respect of the said appeal to this House, the amount of such last-mentioned costs to be certified by the Clerk of the Parliaments: And it is also further ordered that the cause be, and the same is hereby, remitted back to the King's Bench Division of the High Court of Justice in Ireland, to do therein as shall be just and consistent with this judgment (2).

"EDWARD P. THESIGER,
"*Clerk Asst. of the Parliaments.*"

Solicitors for the appellants: *Le Brasseur & Oakley* for *Casey & Clay.*

Solicitors for the respondents: *Badham & Co.* for *Ignatius J. Rice.*

(1) The judgments in the House of Lords have been printed from the verified report of Messrs. Gurney & Son, 26 Abingdon Street, London. For this and other assistance in the publication of the present report the Editor has to acknowledge the courtesy of the solicitors for both parties.

(2) Before a second trial a compromise was arrived at. The Right Hon. J. H. Campbell, on behalf of the plaintiffs, unreservedly withdrew all imputations on the conduct of the defendants' engineers.

BURKE *v.* IRWIN (1).

Appeal.
1907.
April 16.

Practice—Security for costs—Plaintiff resident in England—Affidavits disclosing good cause of action—Gen. Ord. XXIX., R. 2.

Defendant was bailee for hire of a valuable horse, the property of the plaintiff, who was resident in England, and had no other property in Ireland. On the 1st October, 1906, the defendant sent the horse to be shod to the farrier whom he usually employed. The next day the horse was lame, and the defendant sent for the farrier, who said that the horse would be well in a day or two. The lameness passed off; but, on the 12th October, the horse developed symptoms of tetanus. The defendant telegraphed to the plaintiff, and the plaintiff telegraphed to a veterinary surgeon, who attended to the horse, but it died from tetanus.

In an action by the plaintiff against the defendant for negligence:—

Held, by the Lord Chancellor and Holmes, L.J. (*diss.* FitzGibbon, L.J.), that as *prima facie* a good cause of action had been shown by the affidavits, the plaintiff should not be ordered to give security for costs.

Held, per FitzGibbon, L.J., that, without definitely pronouncing upon the merits of the action, the affidavits did not disclose a sufficiently clear case against the defendant to deprive him of his right to security for costs, having regard to the decision of the Court of Appeal in *Watson* v. *Porter* ([1907] 2 I. R. 341) (2), and its uniform practice in remitting cases to Quarter Sessions.

APPEAL from an order of Boyd, J. (sitting for the King's Bench Division), directing the plaintiff to give security for the costs of the action.

The action was brought by the plaintiff, a horse-dealer residing in England, against the defendant, a farmer residing in Sligo, to recover damages for the loss of the plaintiff's horse "Pindar," through the defendant's negligence. The horse had been for some months in the charge of the defendant, who was paid 11*s.* a week for his keep. On the 1st October, 1906, the defendant sent the horse to the farrier whom he usually employed to be shod.

(1) Before THE LORD CHANCELLOR, and FITZGIBBON and HOLMES, L.JJ.

(2) In this case the Admiralty action, tried before Johnson, J., and a jury, resulted in a verdict against the plaintiff in the Common Law action.

Appeal. 1907.

BURKE v. IRWIN.

The next day the horse was lame, and the defendant sent for the farrier, who told him that the horse would be all right in a day or so. Within two days the lameness had disappeared; but on the 12th October the horse showed symptoms of tetanus. On the 13th the defendant telegraphed to the plaintiff—"Pindar dying of lock-jaw. Is he insured?" but he did not send for a veterinary surgeon. On receipt of the telegram the plaintiff telegraphed to a veterinary surgeon in Sligo to attend to the horse. The veterinary surgeon attended to the horse; but it died a few days after of tetanus. The plaintiff had not any property in Ireland. It was stated that the horse had won £2000 in stakes on the turf in England.

The defendant moved that the plaintiff should give security for costs. Boyd, J., granted the order, and the plaintiff appealed.

M. F. Linehan, for the appellant, referred to *Watson* v. *Porter* (1); *Graham* v. *Wray* (2); Ord. XXIX., Rule 2.

E. V. Longworth, for the respondent, cited *White* v. *Carroll* (3); *Yorke* v. *M'Laughlin* (4).

THE LORD CHANCELLOR:—

We are not all agreed on this appeal. I am of opinion that the plaintiff ought not to be ordered to give security for costs. The words of the Rule are plain and clear: "A defendant shall not be entitled to an order compelling a plaintiff to give security for costs solely on the ground that the plaintiff resides in England." The question is—Are there special circumstances here? In my opinion there are not. It is not, in my opinion, on the evidence before us, a case in which a Judge would hold that there was no cause of action. The horse was shod on the 1st October: the next day the defendant noticed that it was lame, and he sent for the smith who had shod the horse. He said the horse would be well in a few days, and it seemed to be going on well. On the 12th October the defendant noticed it was ill, and he wired to the plaintiff, and

(1) [1907] 2 I. R. 341.
(2) 35 I. L. T. R. 237.
(3) I. R. 8 C. L. 296.
(4) *Ibid.* 547.

asked if it was insured. The plaintiff wired to a veterinary surgeon in Sligo to go and see the horse. He did so, and found the horse had tetanus; and after that, it died. I do not think a Judge would be justified in saying that there was no evidence of negligence on the part of the defendant to go to a jury. That being so, the word "solely" in Gen. Ord. XXIX., Rule 2, comes in, and the defendant, in my opinion, is not entitled to an order compelling the plaintiff to give security for costs.

FITZ GIBBON, L.J.:—

It appears to me impossible to hold, consistently with our decision in *Watson* v. *Porter* (1), that the rule is only to apply to cases where there is no evidence to go to the jury. That was an action for slander in which the words complained of were spoken of the plaintiff in relation to his calling as a master mariner. The plaintiff had a floating residence, as he was a sea-faring man. He had an action for wages pending in the Admiralty Court, arising out of the same circumstances and involving the same considerations; and the Lord Chancellor, in giving judgment, referred to the fact that the master's conduct might be investigated—meaning, I suppose, that his character might be vindicated—in the second action. The plaintiff was there ordered to give security for costs.

It appears to me that in cases of this kind, and in ordering security for costs, the Court ought to act upon the same principle which is applied to motions to remit. Over and over again we have remitted actions to the County Court, on the ground that the evidence, as it appeared on the affidavits before us, was not sufficient to maintain an action; but in many such cases we have stated that our remitting was not to be construed as a final decision that the action was a sham, or that the plaintiff must be non-suited. Looking at the facts now before the Court in this case, I am unable to see any evidence of negligence causing damage on the part of the defendant. The horse was shod on the 1st of October; on the next day the defendant noticed that he was lame. The farrier who had

(1) [1907] 2 I. R. 341.

Appeal. 1907. BURKE v. IRWIN. Fitz Gibbon, L.J.

shod the horse was sent for, and said that he would be all right in a day or two; within two days the lameness had disappeared. It was not until October 12 that he developed symptoms of tetanus. The defendant then telegraphed to the plaintiff, who telegraphed to a veterinary surgeon in Sligo to attend to the horse. When the veterinary surgeon came, he found the horse had tetanus, and it subsequently died.

As a bailee for hire, the defendant was bound to take the same reasonable care of the plaintiff's horse that a prudent owner would take of his own property. In my opinion he did so. To suggest that he should have got a veterinary surgeon to shoe the horse is absurd. It is not suggested that the farrier was so incompetent that it was actionable negligence to employ him. When the horse was first seen to be lame, the defendant sent at once for the farrier, who said he would be all right in a day or two; and in two days he seemed to be all right. It is quite beyond the limit of ordinary prudence to call in a veterinary surgeon if a horse goes lame for a couple of days after he is shod: sending for the farrier, ought to be enough. As to the subsequent matters—as soon as it was noticed that the horse was again ailing, the owner was informed, and a veterinary surgeon was immediately sent for.

Under these circumstances, the refusal of an order for security for costs is, in my opinion, inconsistent with *Watson* v. *Porter* (1), and with the practice on motions to remit; the order, if granted, would not be made solely on the ground that the plaintiff is living in England, but on the ground that the affidavits do not disclose a case against the defendant with sufficient clearness to warrant his being compelled to defend himself against a plaintiff beyond the jurisdiction, unless security is given for his costs.

HOLMES, L.J.:—

Mr. Longworth put his case on two grounds—1, that the plaintiff is living in England; and 2, that his cause of action is very doubtful. I cannot accede to that. The words of Order

(1) [1907] 2 I. R. 341.

XXIX., Rule 2, are clear and explicit. I think the affidavits disclose evidence of negligence which must be left to a jury. Under those circumstances I cannot depart from the general rule that a plaintiff shall not be compelled to give security for costs, solely on the ground that the plaintiff is resident in England.

Solicitors for the plaintiff: *O'Connor & Dudley.*
Solicitors for the defendant: *Robinson & Williams.*

R. D. M.

IN RE NIBLOCK, A BANKRUPT (1).

K. B. Div. Bankruptcy. 1907. April 30. May 3, 17.

Bankruptcy—Crown debt—Liquidated damages in respect of rent of telephone —Preferential claim.

The bankrupt had rented a telephone service-wire from the Postmaster-General, under an agreement dated 2nd June, 1905, which contained a provision that if he should become bankrupt the Postmaster-General might terminate the agreement by notice in writing, and that on doing so the Postmaster-General should be entitled to recover forthwith, as liquidated damages, and not by way of penalty, a sum equal to the whole subscription which would become payable between such termination and the expiration of the agreement. The adjudication took place on the 15th October, 1906, and notice of the termination of the agreement was served on the 14th November, 1906:—

Held, that the Postmaster-General was entitled, as a preferential Crown debt, to the amount he claimed as liquidated damages in respect of the rent of the telephone up to the 18th June, 1908, the date at which the agreement would expire by efflux of time.

APPLICATION on behalf of the Postmaster-General for an order that the sum of £6 12*s.* 1*d.*, due by the bankrupt for work done and material supplied in replacing telephone apparatus destroyed by fire, be paid in full as a preferential Crown debt, and for an order that the Postmaster-General be declared entitled to the sum of £3 17*s.* as and for liquidated damages in respect to rent of telephone up to 18th June, 1908, in terms of condition No. 7, in agreement

(1) Before BOYD, J.

K. B. Div. 1907.

In re NIBLOCK.

dated June 2, 1905, between the bankrupt and the Postmaster-General, and that this sum should also be paid as a preferential Crown debt. By the said agreement the bankrupt rented a telephone service-wire from the Postmaster-General, at an annual subscription of £3, payable in advance, and a minimum payment for calls of £1 10*s.* per annum, payable in advance. The material portion of condition No. 7 was as follows:—" . . if the subscriber shall be adjudged bankrupt . . . . the Postmaster-General may terminate this agreement by notice in writing at any time thereafter . . . as from the time of the service of such notice upon the subscriber . . . any such determination shall cancel this agreement. The Postmaster-General shall also be entitled to recover from the subscriber forthwith as liquidated damages, and not by way of penalty, . . . a sum equal to the whole subscription which would become payable between such determination and the expiration of this agreement." Niblock was adjudicated a bankrupt on 15th October, 1906; and notice of the termination of the agreement under said condition was served on 14th November, 1906. There was no dispute as to the preferential claim for £6 12*s.* 1*d.*; and the question discussed was therefore limited to the question of the right to preferential payment of £3 17*s.* under condition No. 7.

Samuels, K.C., for the Postmaster-General:—

This is a Crown debt for which the Postmaster-General is entitled to preferential payment in full: Sir G. Mellish, L.J., in *Ex parte Kemp* (1). The Crown writ of extent would apply to this case, as the assignees had in their hands the goods of the debtor. There had not been a *cessio bonorum.*

If this had been an agreement with the National Telephone Company, the Company could have proved for this amount under section 47 of the Act of 1872; it was a debt provable in bankruptcy. The position of the Crown in such a case is explained in *Ex parte Postmaster-General, In re Bonham* (2); *In re West London Commercial Bank* (3); *National Telephone Company* v. *Griffen* (4); *Keith, Prowse, & Company* v. *National Telephone Com-*

(1) L. R. 9 Ch. App. 383, at p. 388.
(2) 10 Ch. D. 595.
(3) 38 Ch. D. 364.
(4) 40 Ir. L. T. R. 35.

pany (1); *In re Galvin, a Bankrupt* (2) The Crown is not bound to go by writ of extent; it could adopt any remedy it chose: *Attorney-General* v. *Leonard* (3). Section 267 of the Bankruptcy Act, 1857, shows that the bankrupt's property vests in the assignees for the benefit of the bankrupt's creditors, that is, of all persons who could claim under section 47 of the Act of 1872, including the Crown.

O'Brien, K.C., for the assignees, admitted that in the case of a Crown debt which had accrued due prior to the bankruptcy the Crown had priority whether it issued its extent or not. If there is a debt at all provable, this is a Crown debt which would give the Crown priority. But the Crown either claims by title paramount to the bankruptcy or through the bankruptcy. If it claims by title paramount, there is no case in the books in which the Crown has carried away property vested in the assignees where the debt was not a living debt at the date of the adjudication. The Crown is not named in the Bankruptcy statutes; but if it elects to come in under the statutes, it will be bound by the statutes. There is no debt which would in the hands of a private individual be provable under the statute. By cancelling the agreement the Postmaster-General has created a debt subsequent to the date of bankruptcy. If he had not cancelled the agreement, he would have come under section 97. The Postmaster-General's right under clause 7 was against the bankrupt; but his property has now passed to the assignees.

Samuels, K.C., in reply.

BOYD, J.:— May 17.

Counsel on behalf of the Postmaster-General has applied to me in this case that two separate sums shall be paid to him, on the grounds that same are debts due to the Crown, and are payable in full as preferential debts. The first of these sums so claimed amounts to £6 12*s.* 1*d.*, the cost of replacing a telephone apparatus which was destroyed by fire on the premises of the bankrupt; and

(1) [1894] 2 Ch. 147. (2) [1897] 1 I. R. 520. (3) 38 Ch. D 622.

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In re NIBLOCK.

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the second is a sum of £3 17*s.*, claimed as and for liquidated damages in respect of the telephone for the year up to the 18th June, 1908. The assignees have admitted the claim in respect of the replacing of the telephone; but they dispute the right of the Postmaster-General to the payment of the sum of £3 17*s.*, and allege that, in the circumstances of this case, he is not entitled to be paid his claim. On the 2nd June, 1905, a written agreement was entered into between the bankrupt, who was then a trader in the town of Banbridge, and the Postmaster-General, for the hire of a telephonic line and instrument for the term of three years, and thereafter until determined, upon the conditions and subject to the payment of the subscription and fees in the said agreement mentioned. It is provided in and by the said agreement that the said agreement might be determined at the end of the said term, or at any time afterwards, by either party giving to the other three calendar months' notice in writing. The rent reserved by the agreement was £3 a year and one penny for each call, with a minimum payment of £1 10*s.* per annum for such fees, that is, a total annual payment amounting to the sum of £4 10*s.* By the second condition endorsed on the said agreement, it was provided that, in the event of the destruction by fire or other accident of any part of the Exchange line, the bankrupt should pay to the Postmaster-General the value of any instrument or other part of the Exchange line destroyed or damaged. The admitted claim of £6 12*s.* 1*d.* is in respect of damage caused by a fire which occurred on the premises. The disputed claim of £3 17*s.* arises under condition 7. By this condition it is provided, amongst other events, that in case "the subscriber shall be adjudged bankrupt" "the Postmaster-General may terminate this agreement by notice in writing at any time thereafter as from the time of such notice upon the subscriber," "any such termination shall cancel this agreement, save for the purpose of carrying this condition and condition No. 13 into effect." "The Postmaster-General shall also be entitled to recover from the subscriber forthwith, as liquidated damages, and not by way of penalty, a sum equal to the whole subscription which would have become payable between such determination and the expiration of this agreement, provided that this agreement shall be deemed to expire within the meaning

of this condition (*a*), if notice is given by the Postmaster-General under this condition within the specified term of years at the end of such period." By condition 11 it is provided that for the purposes of this agreement "an account, certified by the Comptroller and Accountant-General of the Post Office, shall be sufficient evidence of the amount due from the subscriber to the Postmaster-General."

On the 20th July, 1906, the whole of the premises of the bankrupt were destroyed by fire, and the telephone instrument and wire were consumed. On the 15th October, 1906, T. H. Niblock was adjudged a bankrupt. On the 14th November, 1906, the aforesaid agreement was determined by the Postmaster-General by notice to that effect served on the bankrupt. The annual rent and charges payable under the said agreement were paid by the bankrupt for the years 1905–6 and 1906–7; and the claim now made is for the rent from June, 1907, to June, 1908, less by a sum of 13*s*., being the balance of a deposit held by the Postmaster-General. If the claim of the Postmaster-General to this payment be well founded, there can be no doubt that he is legally entitled to be paid same as a preferential payment.

Now, how does this claim arise? It arises under the express agreement made between the Postmaster-General and Niblock, whereby it is provided, as I have said, that upon the determination by the Postmaster-General of the agreement, a number of items shall take effect, with the effect also of bringing forward moneys that would not have been due until 1908, as a present claim due to the Postmaster-General. Otherwise the agreement would only terminate on the condition that the time for the entire period stipulated under the agreement—three years—should have elapsed. But the agreement has been determined by the Postmaster-General under the condition I have mentioned, and, therefore, in my opinion, clearly this is a payment due under the agreement entered into between the Postmaster-General and Niblock, and, as a legal claim due to the Crown, it should be paid in priority.

I regret to have to come to this conclusion, because I think it hard that the assignees or the creditors should be obliged to pay this money out of the funds in their hands. It is a hard thing, in

K. B. Div. 1907. *In re* NIBLOCK. Boyd, J.

my opinion, that a payment, that would not have become payable at all, had the agreement continued, until the determination of the tenancy at the end of three years, should be anticipated by the Postmaster-General, by reason of his act in the determination of that agreement, and thus bringing forward payment to an earlier date. I have nothing, however, to do with the hardships of the creditors in the matter. All I have to consider is what is the legal effect of the agreement; and, in my opinion, the legal effect of it is that this is a debt due to the Crown as a preferential claim. The cases that were cited in the course of the argument show that where a debt is due to the Crown it is entitled to preferential payment. Therefore, there can be no doubt this debt is a preferential claim, and under these circumstances I am coerced to give judgment in favour of the Postmaster-General.

Solicitor for the Postmaster-General: *Edward R. Bate.*
Solicitors for the Official Assignees: *Casey & Clay.*

W. M'G.

K. B. Div. 1907. Feb. 27. June 14, 27.

DORRIAN, APPELLANT; M'HUGH, RESPONDENT (1).

Licensing law—Early closing license—Time for closing on Saturday nights—Licensing (Ireland) Act, 1874 (37 & 38 *Vict. c.* 69), *s.* 2—*Intoxicating Liquors (Ireland) Act*, 1906 (6 *Edw.* 7, *c.* 39), *s.* 2—*Selling intoxicating liquor during prohibited hours—Opening for sale during prohibited hours—Two convictions in respect of same transaction.*

Since the coming into operation of the Intoxicating Liquors (Ireland) Act, 1906, the holder of an early-closing license must close his premises on Saturdays at 9 p.m. in the case of towns the population of which exceeds 5000:—

So *held*, by Lord O'Brien, L.C.J., and Andrews and Wright, JJ.; Palles, C.B., and Madden, J., *diss.*

A person convicted of selling intoxicating liquor during prohibited hours

(1) Before LORD O'BRIEN, L.C.J., PALLES, C.B., and ANDREWS, MADDEN, and WRIGHT, JJ. The case was first argued on February 27th, before LORD O'BRIEN, L.C.J., and JOHNSON, BOYD, and WRIGHT, JJ., and was ordered to stand over for further argument.

cannot also be convicted of opening for sale during prohibited hours, the selling and opening being part of the same transaction on one and the same occasion.

CASE STATED under 20 & 21 Vict. c. 43.

At a Petty Sesions held in and for the Petty Sessions district of the city of Londonderry, in the county of the city of Londonderry, on Monday, 11th February, 1907, the appellant was charged as defendant in a summons for that he did at Strand Road in the said city of Londonderry, on Saturday night, the 19th January, 1907, at 9.15 p.m., being then and there the holder of a six-day and early-closing license only, sell by retail on his licensed premises there situated, intoxicating liquor at a certain hour and time during which the sale thereof on such premises was by law prohibited, contrary to the provisions of the Licensing Acts (Ireland), 1872–1874, and the Intoxicating Liquors (Ireland) Act, 1906, in respect of the closing of such premises by the holders of six-day and early-closing licenses. The appellant was further charged in another summons for that he at Strand Road in the said city of Londonderry, on Saturday night, 19th January, 1907, at 9.15 p.m., being a person duly licensed to sell intoxicating liquor by retail, did open his licensed premises for the sale of the same at a certain hour and time during which the sale thereof was by law prohibited, contrary to the provisions of the above-mentioned Acts.

At the hearing of the summonses the following matters were proved:—The appellant was a licensed publican carrying on a retail business on Strand Road in the county of the city of Londonderry. He was the holder of a six-day and early-closing license only. Londonderry is a city with a population according to the last Parliamentary census exceeding 5000. On Saturday night, 19th January, 1907, at 9.15 p.m., a sergeant of the Royal Irish Constabulary entered the appellant's shop, which was open at the time, and found persons in the bar drinking beer. The appellant was himself present, and stated that he had his premises open to assert his right.

In the certificate for the renewal of his license granted to the appellant by the Justices at the Annual Licensing Petty Sessions in September, 1906, the following conditions were inserted as in the previous years:—"(9) The premises in respect of which this

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certificate is granted shall be closed during the whole of Sunday. (10) The premises in respect of which this certificate is granted shall be closed at the hour of 10 o'clock p.m., being one hour earlier than that at which, but for this condition, the same premises would have had to be closed." In pursuance of this certificate the Commissioners of Inland Revenue granted to the defendant a six-day and early-closing license, on the 10th day of October, 1906, for one year.

The magistrates convicted the appellant on each summons, but on his application stated the present case, from which the above facts are taken; the question for the Court being whether they were correct in point of law in their determination, or as to what should be done in the premises.

Chadwick (with him *Henry, K.C.*, and *Patchell, K.C.*), for the appellant:—

By section 43 of the Refreshment Houses (Ireland) Act, 1860 (23 & 24 Vict. c. 107), a publican was allowed to keep his premises open and sell spirits, wine, and beer, up to 11 o'clock, p.m., on every day except Sunday, and the other special days mentioned in the section. Section 78 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), amended section 43 of the Act of 1860, in certain respects not material to the present case, and imposed penalties for selling intoxicating liquor, or keeping open the premises for such sale, at times other than those limited by section 43 of the Act of 1860 as amended by section 78 of the Act of 1872. Section 2 of the Licensing (Ireland) Act, 1874 (37 & 38 Vict. c. 69), authorized the granting of early-closing licenses. The Justices are to cause to be inserted in the certificate for such license a condition that the applicant shall close the premises one hour earlier at night than that at which such premises would otherwise have to be closed; and this condition is to be inserted in any license granted in pursuance of the certificate. The holder of such a license is bound to close his premises at night one hour earlier than the ordinary hour at which such premises would be closed under the provisions of the Act of 1872. The license in the present case was granted under that section; and admittedly prior to the passing of the Intoxicating Liquors (Ireland) Act, 1906 (6 Edw. 7,

c. 39), the appellant had the right to keep open till 10 o'clock on all week days. The question is, has this right been affected by section 2 of the Act of 1906. We submit that it has not. The section is a penal one, and therefore must not be extended by construction: *Proctor* v. *Mainwaring* (1), *per* Abbott, C.J., at p. 146. The Court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words: *Dyke* v. *Elliott* (2), *per* James, L.J., at p. 191. A new law ought to be construed so as to interfere as little as possible with vested rights: *Reid* v. *Reid* (3), *per* Bowen, L.J., at p. 408. The case of an early-closing license is within neither the spirit nor the letter of section 2 of the Act of 1906. The object was that all publichouses should close at 10 o'clock in the case of towns with a population exceeding 5000, not that some should close earlier. The language of the earlier part of the section prohibits the sale, or keeping open for sale, after 10 o'clock on Saturday; and the amendment of the former law is expressly confined to an amendment "in this particular." Section 2 of the Act of 1874 must still be read as referring to the hours *then* in force. There is no substantial hardship to the holders of ordinary licenses, since the section applies only to one day in the week, viz. Saturday. But in any event this consideration cannot affect the construction of the section.

We further rely on the form of the certificate in this case, which expressly fixes 10 o'clock p.m. as the hour for closing on week days.

Dudley White and *O'Brien, K.C.*, for the respondents:—

By section 2 of the Act of 1906, the provisions of every Act as to selling, &c., intoxicating liquor, or keeping open for the sale of such, are to be amended as if (in the case of towns with a population exceeding 5000) 10 o'clock p.m. was the hour specified therein as the hour at which the premises were to be closed on Saturdays. Section 43 of the Act of 1860 is therefore to be read as permitting the sale of drink, and the keeping open of the premises, only up to 10 o'clock p.m. on Saturdays in the case of

(1) 3 B. & Ald. 145. (2) L. R. 4 P. C. 184. (3) 31 Ch. D. 402.

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ordinary licenses. The provisions of section 2 of the Act of 1874 require that the holder of an early-closing license must close one hour earlier than the holder of an ordinary license, and therefore the appellant is bound to close at 9 p.m. on Saturdays. It might have been different if section 2 of the Act of 1874 had specified an absolute hour, 10 o'clock, at which the holders of early-closing licenses were to close; but this is not done. The hour is fixed. not absolutely, but relatively to the hour of closing in case of ordinary licenses; and in consideration of this the holder of the early-closing license pays only six-sevenths of the ordinary duty.

As to the point made on the form of the certificate, the words directing that the premises shall be closed at 10 o'clock p.m. are mere surplusage. They simply state what was the closing hour at the time when the certificate was granted. That hour has since been altered by the effect of section 2 of the Act of 1906; and such alteration applies to existing as well as future licenses. The Act is to come into operation on the 1st January, 1907. The amendment effected on the coming into operation of the Act is an amendment, not in the nature of the license in future to be granted, but as to the lawfulness of keeping open after certain hours.

Henry, K.C., in reply :—

By the second branch of section 2 of the Act of 1906, the provisions of every Act (in regard to penalties and otherwise) relating to selling, &c., intoxicating liquors or keeping premises open for such sale, are to apply as if the hours of 10 o'clock and 9 o'clock at night, respectively, were specified therein as the hours at which licensed premises are required to be closed on Saturdays. Sect. 2 of the Act of 1874 must, therefore, be amended by reading into it 10 o'clock p.m. on Saturdays as the hour specified for closing in case of cities with a population exceeding 5000, instead of "one hour earlier than the ordinary hour," &c.

The settled rule for the construction of penal sections is that if there are two reasonable constructions, the more lenient one must be given: *Tuck & Sons* v. *Priester* (1), *per* Lord Esher, M.R.

(1) 19 Q. B. D. 629, at p. 638.

Where there is an enactment which may entail penal consequences, you ought not to do violence to its language in order to bring people within it, but ought rather to take care that no one is brought within it who is not included in it by express language: *London County Council* v. *Aylesbury Dairy Co.* (1), *per* Wright, J.

O'Brien, K.C.:—

With respect to the argument founded on the amendment effected by the second branch of section 2 of the Act of 1906, we submit such amendment must be confined to sections of former Acts imposing penalties, or punishments in the nature of penalties. No penalty or punishment is imposed by the 2nd section of the Act of 1874.

Cur. adv. vult.

June 27.

WRIGHT, J.:—

This is a case stated by the Justices of the county of the city of Londonderry, for the opinion of this Court, under the 20 & 21 Vict. c. 43.

Dorrian, a publican, holding under a six-day early-closing license in Londonderry, was fined by the magistrates at Petty Sessions for selling intoxicating liquor on Saturday, the 19th of January, 1907, at 9.15 p.m., contrary to the provisions of the Licensing Acts, 1872 to 1906; and the question for our decision is whether their determination was in point of law correct.

To answer this question, it is necessary to refer to some earlier Irish Licensing Acts, as well as to the Act of 1906.

By the 23 & 24 Vict. c. 107, s. 43, the holder of a license in any part of Ireland could keep his house open, and sell wine, beer, and spirits, up to 11 o'clock p.m. on every day in the year except Sunday, Good Friday, Christmas Day, or any day appointed for a public fast or thanksgiving. This was the state of the law, and 11 o'clock p.m. was the closing hour on all week days and all through Ireland, from 1860, for some years.

By the Act of 1872, 35 & 36 Vict. c. 94, s. 49, power was given to an applicant, whether for a new license or a transfer or

(1) [1898] 1 Q. B. 106, at p. 109.

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renewal, to apply for *a six-day license*; and if such an application were granted, the holder got a license in which was inserted a condition that the premises were to be closed during the whole of Sunday. By section 78 of the same Act, the closing hour was fixed on days, other than Sundays, &c., at 10 p.m. for towns having a population not exceeding 5000, which left the closing hour for larger towns, such as Londonderry, having a population exceeding 5000, on Saturday nights at 11 p.m. The next statute to be noticed is the Licensing Act of 1874, 37 & 38 Vict. c. 69, under which early-closing licenses, as they are termed, first came into existence. A successful applicant for such a license gets it with a condition inserted in it under section 2, that he shall close his premises at night one hour earlier than the ordinary hour at which such premises would be closed under the principal Act, 35 & 36 Vict. c. 94, just referred to; and if the license were both a six-day license and an early-closing license, the holder was, under sect. 3, entitled to a remission of two-sevenths of the duty. Next comes the Sunday Closing (Ireland) Act, 1878, 41 & 42 Vict c. 72, which it is necessary only briefly to mention, which allowed licensed persons to keep their licensed premises in the five specified cities of Dublin, Cork, Limerick, Waterford, and Belfast, open from 2 p.m. to 7 p.m. on Sundays.

Under the law as it stood prior to the passing of the Licensing Act of last year, Dorrian, defendant and appellant, who was the holder of a six-day early-closing license for premises in Londonderry, a town having a population of over 5000, could keep his house open for sale, and could sell spirits, wine, and beer, on Saturday nights up to 10 p.m., as being one hour earlier than the time up to which the holder of a license unfettered by any condition as to early-closing could keep open and sell. This was the state of the law, and this was the *status* of the publican Dorrian up to the passing of the Act of last year, 6 Edw. 7, c. 39.

Section 1 of that Act deals with the sale of drink on Sundays, and amends section 1 of the Sunday Closing Act of 1878, to which I have just referred, by cutting down the closing hour in the five specified cities on that day from 7 p.m. to 5 p.m.

Section 2, in like manner cuts down the closing hour on Saturday night to 10 p.m. in the case of all cities or towns

having a population exceeding 5000, and in all other towns and places in Ireland, to 9 p.m., and declares that the provisions of every Act (in regard to penalties, and otherwise), relating to selling, &c., intoxicating liquor are to be amended in this particular, and are to apply as if such hours were specified in said Acts as the hours at which licensed premises are required to be closed on Saturdays.

Previously, as I have pointed out, the closing hour in the former class on Saturday nights was 11 p.m., in the latter class was 10 p.m.

The effect of this in my judgment is to make 10 p.m. the closing hour on Saturday nights for the holders of ordinary full unconditional licences in the large towns like Londonderry, from the 1st of January, in the present year.

What is the effect of this on the holder of an early-closing license in such a town? This question is answered by referring again to what an early-closing license is. It is a license in which is inserted a condition, not that he shall close at a certain named hour, but that he shall close his licensed premises one hour earlier than the ordinary hour at which they would otherwise be closed. He is bound to close, not at an hour specified in the license, but at an hour relative to, *i.e.*, one hour earlier than, the ordinary general closing hour of an unrestricted license. Up to the end of 1906, the ordinary closing hour for Dorrian on Saturday nights was 10 p.m.; and the license granted to him states this fact accurately and in accordance with the existing law: "The premises shall be closed at 10 p.m., being one hour earlier than," &c. This latter statement is an accurate statement of fact according to the then state of the licensing law; but it is not an essential part, nor any part, of the condition, which is that the premises shall be closed one hour earlier than the ordinary hour at which but for such condition they would have been closed under law.

Once by law the ordinary closing hour is altered and shortened to 10 p.m. on Saturday night—and that, in my opinion, is what section 2 of the Act of 1906 does—it appears to me to follow clearly and irresistibly that the holder of a license subject to this condition must close an hour earlier on Saturday than the ordinary

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hour—namely, at 9 p.m.; and accordingly I hold that Dorrian was rightly convicted of selling drink at 9.15 p.m. on Saturday night, the 19th January, 1907.

ANDREWS, J. :—

The Act of 1906 (6 Edw. 7, c. 39) was, as its title states, an Act to amend the law relating to the sale of intoxicating liquors in Ireland on Saturdays and Sundays. The character of the amendment was the shortening of sale hours, and as regards Sundays the amendment was made by section 1, with which we are not concerned in the present case.

The amendment as regards Saturdays was made by section 2, the true construction of which is the question we have to decide. I think the intention of the Act was to shorten on Saturdays the sale-hours in *all* premises licensed to sell intoxicating liquors in the cities and towns and places respectively referred to in the second section, and not to limit the shortening to one class of licensed premises only, leaving another class with unshortened hours. In one aspect this section may be regarded as penal, and in another as remedial; but, however regarded, the question is, What is its true construction—what in fact has it enacted? The whole of this section must be read together; and its amendment of the Acts in force when the Act of 1906 was passed must now be read into these Acts. From and after the date at which the Act of 1906 came into operation (viz., 1st January, 1907) the previous Acts must, in my opinion, be read and applied as so amended, and I do not think we can now read the Act of 1874 (which I shall hereafter refer to) as applicable only to the state of the law as regards closing hours which existed at that date. I think it must now be read as applicable to the amended law. The effect of the 2nd section of the Act of 1906 was to insert in the 43rd section of the Act of 1860 (23 & 24 Vict. c. 107) 10 o'clock p.m. in place of 11 o'clock p.m. as the closing hours on Saturdays of all premises licensed to sell intoxicating liquors by retail in cities and towns with a population of over 5000, Londonderry being one of these. The 78th section of the Act of 1872 (35 & 36 Vict. c. 94) did not, I think, alter the closing hour on Saturdays in cities and towns with a population of over 5000, and it left that hour 11 o'clock p.m.,

as specified in section 43 of the Act of 1860; but, in my opinion, the Act of 1906 by its 2nd section also in effect inserted in sect. 78, 10 o'clock p.m. as the closing hour on Saturdays in cities and towns with a population of over 5000. The appellant is the holder in Londonderry of an early-closing license; and the Act of 1874 (37 & 38 Vict. c. 69) by section 2 requires the holder of an early-closing license to close his premises an hour earlier than they should be closed under the Act of 1872, which is therein referred to as the principal Act. This hour, as regards the appellant's premises, was by section 2 of the Act of 1874, 10 o'clock p.m. before the Act of 1906, and after that Act came into operation, on the 1st January, 1907, 9 o'clock p.m., by reason of the amendments made by the 2nd section of the Act of 1906 in the 43rd section of the Act of 1860, and the 78th section of the Act of 1872, and by the operation of the 2nd section of the Act of 1874 upon the hours in those sections as so amended.

The provisions of the 2nd section of the Act of 1874 are not, in my opinion, provisions which the 2nd section of the Act of 1906 declared should be amended; and the following words in the 2nd section of the Act of 1906 (referring to the provisions of every Act relating to selling or exposing for sale or purchasing intoxicating liquor or opening and keeping open and so forth)—viz.: "shall be amended in this particular, and shall apply as if the said hours, respectively, were specified therein as the hours at which licensed premises are required to be closed on Saturdays"—in my opinion mean shall be amended so that the hours mentioned in that section shall become the hours at which licensed premises shall be required by the amended Acts to be closed on Saturdays; and then the 2nd section of the Act of 1874 operates on these hours.

I am therefore of opinion that the appellant was liable to be convicted upon either of the summonses referred to in the case stated, but that he ought not to have been convicted on both, as in substance and reality there was only one offence; and by the second conviction and the sentence thereon he was punished a second time for what in this case was in substance the same offence; and the second conviction ought to be quashed.

I therefore think the judgment of the Court ought to be that

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the Justices were correct in point of law in convicting the appellant on the first summons; but that the conviction upon the second summons referred to in the case stated ought to be quashed, for convicting and punishing the appellant a second time for what was in this case, in substance, the same offence as he was convicted of and punished for on the first summons; the selling and opening, having both been part of one and the same transaction on one and the same occasion.

PALLES, C.B.:—

This is the judgment of Mr. Justice Madden and myself.

The object and scope of section 2 of the Intoxicating Liquors (Ir.) Act, 1906, is to prohibit publichouses being open on Saturdays after 10 o'clock in the excepted cities and towns, and after 9 o'clock elsewhere. In plain words, the first limb of the section enacts this prohibition, but this only:—"It shall not be lawful for any person to sell or expose for sale intoxicating liquor, or to open or keep open any premises for the sale of the same, on Saturdays after 10 o'clock at night in the case of cities or towns, the population of which, according to the last Parliamentary census, exceeds 5000, and after 9 o'clock at night in all other towns and places in Ireland."

But to make the prohibition effective, something more was required. A mere prohibition without a penalty is found ineffective in licensing law; and to make this new prohibition effective it was necessary to prescribe penalties for its breach.

Penalties could have been prescribed in either of two modes—(1) by expressly enacting them, or (2) by applying to the acts, now for the first time prohibited, penalties which previously were applicable to some other prohibited acts.

The Legislature in this instance adopted the second mode, and proceeded, in most sweeping and, indeed, drag-net words, to apply to acts rendered unlawful by the new prohibition a number of penalties previously applicable to offences of the same class, but differing in the hour beyond which the prohibition formerly applied.

The acts rendered unlawful by the statute are selling or exposing for sale intoxicating liquor, or opening or keeping open

premises for the sale thereof, after the newly-prescribed hours of 9 p.m. and 10 p.m., respectively.

Now, by what words are these provisions of former statutes applied to the newly-created offences? "And the provisions of every Act . . . shall apply *as if*" the newly-prescribed hours "were specified therein as the hours at which licensed premises are required to be closed on Saturdays." The amendment is in words restricted to "this particular." Thus, it is not necessary, as it was in the cases cited by Mr. Henry, to rely alone on the object of the section for the purpose of limiting its effect. Its limitation is effected, not merely by implication arising from its purpose, but by that which is infinitely stronger, the very words of the enactment itself. The former statutes are amended *in this particular*, and applied "*as if*" the newly-prescribed hours were mentioned in the former statutes "as the hours at which licensed premises are required to be closed on Saturdays."

These words, "as if," are transparently clear and absolutely coercive. They confine the scope of the second limb of the section so as to make it co-extensive with that of the first, and expressly limit the operation of the second limb to effectuating the purpose mentioned in the first limb.

Now, in this prosecution we are asked, in the face of those words, to hold that the Act has directed such an amendment of a previous enactment relating to sales of intoxicating liquors as to make the hour at which the Act so amended requires the appellant's premises in one of the excepted cities to be closed, not 10 o'clock, the hour directed to be introduced by the amendment, but 9 o'clock.

This is wholly unwarranted. It is not necessary to occupy public time by considering in detail the ingenious argument by which such a conclusion is sought to be arrived at. It is sufficient to say that the words of the section show that any argument which leads to such a result must be wrong, because it seeks, by amendment alleged to be authorized by the section, to achieve a result in excess of that to the effectuation of which the amendment thereby authorized is, by the statute, expressly limited.

In my opinion, the question should be answered in the negative, and the Justices should be directed to dismiss the complaint.

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LORD O'BRIEN, L.C.J.:—

I retain the opinion I had formed at the close of the first argument of this case. The question presented for our determination is a very narrow, but a very important, one:—What effect has the Licensing Act of 6 Edw. 7, c. 39, s. 2, upon those who have an early-closing license under the Licensing Act of 1874, s. 2? But for the Act of Edward, the hour for early closing would be 10 o'clock in Londonderry—that is to say, one hour earlier than what is prescribed in the case of a seven-day ordinary license. This is absolutely plain. The Act of 1874, sect. 2, fixed an hour *relatively*—that is to say, by reference to sect. 43 of the antecedent Act of 1860 (23 & 24 Vict. c. 107), which I may designate the standard Act. Now, it is manifest that, by virtue of the provisions of the Act of Edward 7, the Act of 1860—what I have called the standard Act—is to be read as if 10 o'clock was prescribed therein for closing, instead of 11 o'clock. This is absolutely plain. Now, it *necessarily* follows from the fact of the Act of 1874, section 2, fixing a *relative* time for closing—an hour earlier than the ordinary time—that the time for early closing must be 9 o'clock in Londonderry, having regard to its population. Mr. Henry insisted, most unquestionably for the first time, that the words, "the hours respectively specified therein as the hours at which licensed premises are required to be closed on Saturdays," should be read as if inserted in the Early Closing Act of 1874, sect. 2. This was suggested by no one at the previous argument, nor, as I understand him, by Mr. Chadwick in the present argument. I did not understand it so, nor did counsel in support of the conviction. The argument was that the Early Closing Act of 1874, sect. 2, was wholly without the Act of Edward 7, sect. 2; but Mr. Henry, in his argument, endeavours to bring it bodily within it, and says not a word as to Mr. Chadwick's argument, that it was without the Act of Edward. He, no doubt, used the common form of saying that he agreed with his junior; but, as far as argument went, proceeded upon inconsistent lines. However, putting aside all question of apparent inconsistencies, I think Mr. Henry's argument was answered by Mr. O'Brien's reply, that the "particular" amendment prescribed by the Act of Edward only applied to Acts by their own express language imposing a penalty—some form of

punishment; and the Early Closing Act of 1874, sect. 2, does not of itself impose a penalty, or any form of punishment. But however this may be, in my opinion the Act of Edward does simply what it purports to do—amends the antecedent Acts by changing one given number into another number: 11, where it was so expressed, into 10. Certainly, it was not intended that the "licensing duty" should not be identical when the hours of closing were identical. It was never intended to change the *relative* and *dependent* character of the Act of 1874, sect. 2. This was dependent, and remains dependent, upon what I called the standard Act of 1860. This view makes the provisions as to early closing consistent with what they were before the Act of Edward, and does not put an early-closing license on the same footing as an ordinary license.

The curial part of the order made by the Court was as follows:

> "IT is considered and adjudged by the King's Bench Division now here that the said Justices were correct in point of law in convicting the appellant, Maurice Dorrian, on the first summons referred to in the case stated, namely, for selling as therein mentioned, and it is ordered that the conviction on the said first summons be, and the same is hereby, affirmed; but that the said Justices were not correct in point of law in convicting the said appellant upon the second summons referred to in the case, namely, for opening as therein mentioned, and it is ordered that the conviction and sentence on the said second summons be, and the same is hereby, quashed, on the ground that the said Justices thereby convicted and punished the said appellant a second time for what was in the case in substance the same offence as he was convicted and punished for on the said first summons, the said selling and opening having both been part of one and the same transaction on one and the same occasion."

Solicitor for the appellant: *C. S. Caldwell.*
Solicitor for the respondent: *Malachi Kelly.*

J. G. T.

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Jan. 25, 28, 30, 31. Feb. 28.

Appeal. May 13–15. June 17.

CLYDESDALE SHIPOWNERS COMPANY (LIMITED) *v.* GALLAHER (1).

(1905. No. 9356.)

Ship—Discharge—Port of Belfast—Custom of port—Average rate of discharge—"Whipping" or "hoisting"—Cargo of wheat in bags.

The plaintiffs' steamship, the "Aboukir," loaded with a cargo of Bombay wheat in bags, arrived at Belfast on Thursday, 28th December. The defendant was the indorsee of the bill of lading, which contained a provision that if the consignee did not take delivery of the goods as soon as the steamship was ready to discharge, they should be landed and warehoused at expense of the owner of the goods. The discharge of this cargo commenced on Friday, 29th December. For four days, up to Tuesday night, the cargo was discharged by whipping—a process by which one bag at a time is hoisted from the hold by the ship's tackles to a point above a weighing-machine, placed at the height of a man's shoulder on an elevated staging on the deck near the hatch. It is then, when weighed, taken by the merchant's stevedore. The plaintiffs having complained to their agent of the slowness of the discharge, and insisting that the cargo should be hurried out at top speed, the plaintiffs' agent informed the defendant's stevedore that he would discharge the rest of the cargo by hoisting—a process by which five bags at a time were raised from the hold of the vessel, and placed on the deck, from which they were trucked to the weigh-bridge, which, in the case of discharge by hoisting, is only a few inches above the deck. The defendant refused to take delivery by hoisting, or to accept delivery from the ship's rail of bags so hoisted, and the remainder of the cargo was discharged by the plaintiffs' men into a warehouse.

An action having been brought by plaintiffs to recover the cost of landing and warehousing this part of the cargo, the defendant relied upon two alleged customs of the port of Belfast—(*a*) that a steamer of the burden of the "Aboukir," laden with grain, should be discharged at the average rate of not less than 500 tons per day, which defendant contended meant not more than 500 tons per day; and (*b*) that cargoes of Bombay wheat in bags should be discharged by whipping:—

Held, by the King's Bench Division (Palles, C.B., and Kenny, J.), that neither of the alleged customs was binding on the shipowners; that the defen-

(1) In the King's Bench Division, before PALLES, C.B., and MADDEN and KENNY, JJ.

dant had been guilty of breach of his contract to accept delivery with reasonable despatch, and that the plaintiffs were consequently entitled to recover, as damages, the cost of landing and warehousing the portion of the cargo in question:—

Held, by Madden, J. (who, however, did not differ from the other members of the Court on any question of law), that, upon the facts proved, whipping was, though not legally binding as a custom, a reasonable mode of discharge adopted by both parties; that the defendant was guilty of no default in taking delivery; and that judgment should be for the defendant.

Held, by the Court of Appeal (the alleged custom as to average rate of discharge having been abandoned by defendant), that the alleged custom of whipping, even if there was sufficient evidence to prove it, was unreasonable, and that plaintiffs were entitled to the damages in question.

THE ACTION was brought by the owners of the steamship "Aboukir" against the defendant, as indorsee of the bill of lading to recover £107 8*s*. as damages for the detention of the ship for three days beyond the time alleged to be necessary for the discharge of the cargo, and £79 9*s*. the expenses consequent on landing and warehousing part of the cargo which was not taken by the defendant as soon as the ship was ready to discharge it.

In addition to other defences, the defendant pleaded that it was an implied term of the contract that the defendant should take delivery according to the custom of the Port of Belfast in respect of grain cargoes, and that delivery was taken of the cargo in accordance with this custom. In answer to a notice requiring particulars, the custom was stated to be one that a steamer of the burden of the "Aboukir" laden with grain should be discharged at the average rate of not less than 500 tons per day. The defendant contended at the trial that this meant an average rate of not more than 500 tons per day. The claim for detention of the ship was not pressed, and was ultimately disposed of in favour of the defendant.

The charter-party named Belfast as one of the ports of destination, and provided that on arrival at the port of destination the cargo was to be discharged without delay, and according to the custom of the port for steamers.

The bill of lading, which did not incorporate the conditions of the charter-party, stated the cargo to be Bombay wheat contained in 45,900 bags, each bag said to weigh 224 lb. net. The freight,

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which was payable in Belfast was "18*s.* per ton of 18 cwt. net weight delivered," and the cargo was to be delivered "from the ship's tackles (when the ship's responsibility shall cease) at the port of Belfast . . . . on payment of freight." It contained a condition—"Should the goods not be taken delivery of by the consignees or assigns as soon as the steamship is ready to discharge, they will be landed and warehoused at the port of destination at the risk and expense of the owner of the goods."

The "Aboukir" arrived in Belfast on the evening of the 28th December, 1905, laden with 4500 tons of Bombay wheat; and the discharge commenced on Friday, the 29th December, 1905, and continued until Saturday, the 6th January, 1906, when the vessel was cleared.

The action was tried before Fitz Gibbon, L.J., without a jury at the Spring Assizes at Belfast, in 1906, when the Lord Justice found that no delay occurred for which the defendant was responsible. He also found as a matter of law that the custom relied on by the defendant in his pleading was unreasonable, and did not bind the plaintiffs. At the trial, the case was made by the plaintiffs that the method of discharge, adopted and insisted on by the defendant, namely, "whipping" the cargo, as distinguished from "hoisting," was inefficient and not calculated to, and did not in fact, give reasonable despatch. In answer to this, the defendant made the case, that it was a reasonable and customary practice of discharge at the Port of Belfast for cargoes of this description, and that the plaintiffs were bound by it, and that it was in itself an expeditious method of discharge, and that if there was any delay in this case, it was due to the ship's stevedore. The process known as "whipping" consisted of one bag at a time being brought from the hold by the ship's tackles to a point above a weighing-machine, which is placed at the height of a man's shoulders from the deck, on an elevated staging on the deck near the hatch. It is then taken when weighed by the merchant's stevedore, and delivery in this manner on such a weigh-bridge is deemed to be delivery to the merchant. The full particulars of this process are stated in the judgment of the Lord Chief Baron, *post*, pp. 589, 590. "Hoisting" consisted of raising a number of bags, five at a time, from the hold of the ship, and placing them

on the deck, whence they were trucked to the weigh-bridge, the weigh-bridge not being at the height of a man's shoulder, but only a few inches above the deck.

From Friday, the 29th December, to Tuesday, the 2nd January, the cargo was discharged by "whipping." On the afternoon of Tuesday, Dorman, the plaintiffs' agent, complained of the slowness of the discharge, and informed Ross & Miller, the agents of the defendant, that on the next day he would commence hoisting. On Wednesday, the 3rd January, the ship's tackles were prepared for hoisting the remainder of the cargo, the weigh-bridge was removed from the staging on which it had been placed, and the bags were not, when weighed, at the height of a man's shoulder, but only a few inches above the deck. The defendants refused to take delivery in this manner, and refused to accept delivery of a bag which had been hoisted and afterwards placed on the ship's rail. The plaintiffs' men then discharged the rest of the cargo into a warehouse. Evidence was given by Burns, the defendant's stevedore, and other witnesses, that according to the custom of the Port of Belfast whipping is the mode of discharge of wheat from Bombay, and that this mode of discharge was obligatory on the shipowners, as being a reasonable and customary mode of discharge. Fitz Gibbon, L.J., found as a fact upon the evidence that whipping was the customary mode of discharging Bombay wheat in bags at Belfast, and that the cargo could have been discharged thereby with reasonable despatch, if that method had been efficiently carried out; and that the defendant and his servants had carried it out with reasonable efficiency and despatch with respect to the portion of the cargo which was discharged by them.

He further found that there was no sufficient satisfactory evidence that, at any stage of the discharge, there was any default or delay on the part of the defendant in taking delivery of the quantity of corn which was brought up by the plaintiffs' servants to the place for delivery to the defendant.

He further found that, having regard to Dorman's inexperience and to the evidence as to the mode in which the whipping was done by the plaintiffs' servants, the cargo was not brought up from the hold to the weigh-bridges, which were accepted as the place of delivery, with reasonable skill, diligence, or despatch.

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He was satisfied that the "ruling gradient" on the line of discharge, which governed the quantity discharged, lay between the hold and the weigh-bridges, being the part of the line for which the plaintiffs were responsible.

He found that up to and including Tuesday evening, as to all the hatches, and Wednesday evening, as to the Nos. 1 and 4, the defendant and his servants used reasonable despatch, and were not guilty of any default or breach of contract, and that they were at all times ready and willing to take delivery, and did in fact take delivery of all corn which the plaintiffs by their servants offered for delivery at the proper place, and in the proper manner.

He further found on the evidence, that when the plaintiffs, by their servants, on Wednesday and on Thursday, tendered bags for delivery which the defendant by his servants refused to accept, the bags were not placed in the usual or customary position, nor where they could be weighed, lifted, and carried away, with reasonable facility or despatch.

On these grounds the Lord Justice held that the plaintiffs were not entitled on either of those days to take the discharge of the cargo into their own hands, and to put the corn into the sheds as they had done. He held the defendant entitled to a verdict.

The plaintiffs applied to the King's Bench Division for a new trial, or in the alternative to enter judgment for the plaintiffs for £79 9*s.*, the expense of landing and warehousing portion of the cargo.

Serjeant Dodd, K.C., The Right Hon. J. H. Campbell, K.C., and *M'Gonigal,* for the plaintiffs.

Ronan, K.C., Gordon, K.C., and *Hanna,* for the defendants.

PALLES, C.B.:—

I regret that the Court has been unable to arrive at a unanimous conclusion. The following is the judgment of Kenny, J., and myself:—

This is an application by the plaintiffs to set aside the verdict which was had for the defendant at the trial and for a new trial, or, in the alternative, to enter judgment for the plaintiffs for the amount claimed for damages for the detention of the ship, and for the expenses of landing and warehousing portion of the cargo.

The action, which was tried by Lord Justice FitzGibbon, without a jury, at the last Belfast Spring Assizes, was brought by the plaintiffs, the owners of the Steamship "Aboukir," against the defendant, the indorsee of the bill of lading, to recover £107 8*s.* as damages for the detention of the ship for three days beyond the time alleged to be reasonably necessary for the discharge of the cargo, and £79 9*s.*, the expenses consequent on landing and warehousing part of the cargo, which it was alleged was not taken by the defendant as soon as the ship was ready to discharge it.

It is unnecessary to refer to the defences, which are sufficient to raise the questions argued, further than to say that one of them relied upon an implied term of the contract of carriage, to the effect that the defendant should take delivery of the cargo according to the custom of the Port of Belfast in respect of the discharge of grain cargoes, and that delivery was taken in accordance with that custom, except in so far as the defendant was prevented from so doing by the acts of the plaintiffs. The defendant, in answer to a notice requiring particulars of the custom relied on, replied that the custom was "that a steamer of the burden of the 'Aboukir' laden with grain should be discharged at the average rate of not less than 500 tons per day."

It appears from the Registrar's certificate that the learned Lord Justice found that the defendant took delivery with reasonable despatch, and without delay, on each of the days of the discharge, so far as the plaintiffs permitted him to do so; that it was not by reason of any breach of contract or act of the defendant that the ship was detained; and that the delivery of the

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cargo, so far as the plaintiffs permitted the defendant to take delivery thereof, was taken by the defendant according to the custom of the Port of Belfast, and in a reasonable manner. Upon these findings judgment was entered for the defendant.

Reading the pleadings, the particulars, and the Registrar's certificate, it would appear that the custom according to which it was found that the delivery was taken, was that relied upon by the particulars, that the cargo should be discharged at the average rate of not less than 500 tons per day; but the learned Lord Justice's report shows that the custom referred to in his findings was a different one, and that he held at the trial that the alleged custom that the discharge should be at an average of not less than 500 tons per day was unreasonable and not binding on the plaintiffs. The custom referred to in the Registrar's certificate is stated by the Lord Justice in his report to "relate exclusively to the method of discharge by whipping and weighing single bags, and lifting and carrying them from the ship." However, nothing material turns upon this. There will be no difficulty in (if necessary) so amending the certificate as to make clear the custom referred to; and the case may be determined on the assumption that that has been done. We mention it only because it has been so much relied on during the argument.

The steamer arrived at Belfast on Thursday, the 28th December, 1905, with a cargo of Bombay wheat, which is stated in the bill of lading to be contained in 45,900 bags, "each bag said to weigh 224 lb. net." The freight, which was payable in Belfast, was "18*s.* per ton of 18 cwt., net weight delivered"; and the cargo was to be delivered . . . "from the ship's tackles (when the ship's responsibility shall cease) at the port of Belfast . . . on payment of freight." The bill of lading contained the usual printed condition, "weight . . . unknown."

The discharge commenced on Friday, the 29th, and continued on Saturday, the 30th December, Monday, the 1st, and Tuesday, the 2nd of January. A vast body of evidence was given at the trial as to the discharge during those four days; and, although we are of opinion that a greater quantity of the cargo could have been delivered during those days, we concur in the conclusion of fact at which the Lord Justice arrived, that the delay which took

place dur[illegible]hose days is attributable to the ship, and not to the defendant. We deem it unnecessary to refer to the evidence which leads us to this conclusion, as the claim for damages in respect of this portion of the delivery was not pressed by Mr. Campbell in the course of his reply, and was, indeed, hardly relied upon by Mr. Serjeant Dodd in his opening statement. By their admission, the matter for our consideration is reduced to what took place late upon the Tuesday evening, the 2nd, and upon the morning of Wednesday, the 3rd of January.

To the due determination of this question it is necessary, in the first instance, to refer generally to the case made by the defendant at the trial. He relied upon two main defences: first, upon the alleged custom which we have already mentioned, that a vessel of the burden of the "Aboukir," laden with grain, should be discharged at the average rate of not *less* than 500 tons per day—a custom which the defendant insisted meant an average rate of not *more* than 500 tons per day. In support of this defence, the defendant gave in evidence, subject to the objection of the plaintiffs' counsel, two reports: the first that of a committee of the Chamber of Commerce of Belfast, dated the 10th November, 1887, and the second that of a joint-committee of the Shipping and Grain sections of that Chamber, which was adopted "as the custom of the Shipping and Grain sections, respectively," of the Council on the 16th March, and by the Council itself on the 17th March, and approved as such by the Harbour Commissioners on the 5th April, and finally confirmed by the Chamber of Commerce, at an open quarterly meeting on the 12th May, 1904.

The first of these reports states that "the Committee appointed by the Chamber of Commerce recommend that the following be the terms of discharge at this port for steamers arriving with grain cargoes without any fixed time or special agreement for discharge, but simply with a clause in the charter-party stipulating that the discharge should be with despatch, according to the custom of the port . . . . cargoes of 2700 (tons) and upwards—consignee shall receive 350 tons per working-day as above." It is further stated, *inter alia*, that, "in addition to the delivery to consignee as before stipulated, the shipowner shall have the right to discharge any further quantity of cargo at his risk and expense

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into Harbour Commissioners' Sheds . . . to be taken delivery of by the consignee from shed, subject to the rules and regulations of the Belfast Harbour Commissioners, at consignee's expense . . . . All the conditions of charter-party and of bills of lading to apply to cargo landed in shed in exactly same manner as if on board the steamer, the steamship owner's lien for freight and charges and his responsibilities remaining intact."

The second of these reports states that "the Committee appointed by the Chamber of Commerce have carefully considered the present rate of discharge. They have conferred with the principal grain merchants and shipowners, and having regard to the facilities at the port for the discharge of such cargoes, the committee are of opinion that the following scale would be a fair rate of discharge for steamers discharging in the port, where no specified time is mentioned in the charter-party, and the cargo is to be discharged either 'within a reasonable time,' or 'as customary,' or 'according to the custom of the port.' . . . Cargoes exceeding 4000, but 'not exceeding 5000 tons at the average rate of not less than 500 tons per day . . . . In every instance the tonnage is to be the bill of lading quantity. The shipowner is to have the option of discharging at his own risk and expense each day any quantity in addition to the foregoing which he may desire, into the Harbour Commissioners' sheds, and the consignee shall take delivery from the sheds in the same way exactly as he would take from the ship; and for all the purposes of the charter-party the discharge from the shed is to be on the same conditions as the discharge from the ship, and the shipowner shall be responsible for all damage that may be done to the grain in the shed in the same way as if it were in the ship, and shall have the same rights of lien against the cargo in the shed as if it were in the ship."

As to this custom, the learned Lord Justice considered himself bound by the authorities to hold that "no alleged custom of the port could, as against the plaintiffs, turn a charter open as to time into a contract fixing the number of lay days; and in reference to the word 'average,' that excess or diminution on one day could not alter the measure of reasonable despatch on other days." "Also that the terms of the resolution fixed only an average

minimum, and could not deprive shipowners or merchants, ignorant of the custom, or not having agreed to it, of their right to any other rate of discharge to which they were entitled."

With these conclusions we entirely concur. Irrespective of authority, we should not have had any hesitation in holding that, as in determining, under such a contract as we have here, the reasonable rate for the discharge of the steamer, the facilities which the steamer had for effecting the discharge, such, for instance, as the number of winches, could not be left out of consideration; and as those facilities might, indeed I might almost say must, vary in each individual steamer, an element must, or at least may, enter into the determination of the reasonable time, which is variable with the particular steamer, and that any custom attempting to fix a definite number of days for the discharge, irrespective of the varying circumstances of the particular case, including the facilities for the discharge of the steamer, would be inconsistent with the contract to discharge, and to accept delivery, within a reasonable time, and therefore could not bind a shipowner or a merchant, who did not contract in reference to it. But in truth the point has already been settled by decision. The matter is fully discussed by Channell, J., in *Ropner* v. *Stoate and Others* (1), with whose judgment, and the grounds of it, we entirely agree. Indeed we think the principle has the authority of the House of Lords. In *Hulthen* v. *Stewart* (2) the question arose upon a charter-party which provided that the cargo should "be loaded and discharged with customary steamship despatch as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports." The ship reached Gravesend, within the port of London, on October 12th, 1900. The ordinary time required for the discharge of such a ship with customary steamship despatch was five days. Owing to the crowded state of the dock, the ship did not get to her berth till October the 22nd, ten days after her arrival, and did not complete her discharge until October 29th. The shipowners brought an action for demurrage, insisting that the charter-party should be con-

(1) 21 *Times* L. R. 245. (2) [1903] A. C. 389.

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strued as if the customary period for discharge, five days, were written into it, *i.e.*, as if it were to discharge within that number of days. Phillimore, J., at the trial, found as a fact that the defendants, the merchants, had done all that they reasonably could to discharge the vessel, and accordingly dismissed the action. This decision having been affirmed by the Court of Appeal, the shipowners appealed to the House of Lords. There, Lord Halsbury said:—"There are two forms in which charter-parties of this character can be made. In one, a specific number of days are given within which the discharge is to be taken; and if those days are exceeded, quite apart from the circumstances, the demurrage is due. If, on the other hand, the parties choose to agree, not to a definite number of days, but to a charter-party such as this, they necessarily import into it the circumstances under which the discharge takes place. If the learned Judge in this case was right in thinking that, humanly speaking, everything was done to enable the discharge to be taken, it is idle to suggest that a well-recognized form, in which an absolute unconditional obligation is taken, is to be imported into that which of itself involves the necessity of considering the circumstances. . . . It comes back to the question, what is the true construction of these words? So far as I can understand the argument, it is that you are to take the capacity of the vessel as equivalent to a number of days, and that because the capacity of this vessel was five days, therefore you are to substitute, in a contract between the parties, the words "five days" for the words you actually find, so as to make that an absolute and unconditional term. It seems to me that that is reasoning for which there is no foundation. Without going through the cases, it appears to me that everyone of these attempts to import an absolute unconditional burden upon the charterers has always failed, because it is to be measured by the legal test, namely, what is reasonable under the circumstances."

Lord Macnaghten, said (p. 392):—"The question is, what is the meaning of this provision? Is it tantamount to fixing a certain number of days or hours within which the discharge of the vessel should be accomplished? Taking the words by themselves, I should say certainly not. The words used do not specify or even, I think, point to a definite period of time. What they do

point to is the discharge of the cargo with the utmost despatch practicable, having regard to the custom of the port, the facilities for delivery possessed by the particular vessel under contract of affreightment, and all other circumstances in existence at the time, not being circumstances brought about by the person whose duty it is to take delivery, or circumstances within his control."

Lord Davey said (p. 394) :—"I think it would be impossible to come to a conclusion favourable to the argument of the appellant, unless you imported words into the charter-party giving it a wholly different complexion from that which the words used by the parties naturally bear."

The clear inconsistency pointed out by those opinions, between such a contract as the present, and one fixing a definite number of days for the discharge, renders it impossible that the custom, even had it been clearly proved, should be incorporated in the contract. Upon this, the principal contention of the defendant, and that for the decision of which, in our opinion, the action was brought, we entirely agree in the judgment of the learned Lord Justice.

The second main defence is one as to which more is to be said. It relates to discharge from two only of the holds, viz., numbers 2 and 3. It appears that the bags in which grain cargoes come from Bombay are usually stronger than those used for such shipments at some other ports, and that a practice is sometimes adopted in the port of Belfast, in discharging grain cargoes from Bombay, which is known by the name of "whipping." It is essential to this mode that one bag only of the cargo shall be hoisted from the hold by each rope at the one time, instead of several bags being hoisted up together, as is usual in other modes of discharge. Instead of the hoisting being effected by means of a rope coiled round the barrel of the winch, and the bags hoisted being then deposited on the rail or deck from the tackles of the ship (the rope being then uncoiled and allowed to drop back into the hold)—instead of this, the ordinary mode, thinner ropes (of which one or two, but not more than two, can be used at a time) are run through smaller gins or pulley-slots than are ordinarily used, and are worked upon the outer edges or drums of the winch, instead of on the barrel. The winch is kept continuously revolving in the same direction. A single bag is lightly attached in the hold to

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the rope, or to each of them if there be two, by means of a small rope called a "sling," detachable from the other, and is brought by the tackles of the ship to a point above a weighing-machine (sufficient to weigh a single bag only at a time), which is placed at the height of a man's shoulders from the deck, being (in such a ship as the "Aboukir") on a staging on the deck near the hatch, or (where two ropes are being used) on two stagings, one at each side of the hatch. To be placed on this weighing-machine, the bag is removed from the tackle by a peculiar motion or jerk, known to experts in this mode of discharge, but not to ordinary stevedores. Thus the bag, when weighed, is in a position in which, with a minimum of labour, it can be lifted by the stevedore. Delivery in this manner upon such a weigh-bridge, is, when this practice is resorted to, deemed to be delivery to the merchant, and the bag, having been weighed, is carried on shore by the merchant's stevedore. The peculiarities of this mode of discharge are: 1st—The parts of the winch used are the drums, not the barrel; 2nd—The winch continues to revolve in one direction, instead of alternately in opposite directions, as in ordinary hoisting; 3rd—One bag only can be taken by each rope at a time from the hold, and as more than two ropes cannot be used at the same time, the discharge is limited to two bags at a time; 4th—Each weighing-machine must be close to the hatch, as one rapid motion of the stevedore has to carry the bag from the sling to the weighing-machine; 5th—The weighing-machine must be at about the height of a man's shoulder from the deck.

The defendant's contention is, that this mode of discharge is a mode of discharge at the port of Belfast, of wheat from Bombay, which is obligatory on shipowners.

From Friday, the 29th December, to and including Tuesday, the 2nd January, the cargo was delivered according to this method—a method upon which the defendant insisted, and upon which the agents of the ship, Messrs. Dorman & Co. (as we find as a fact) *bona fide* believed he was entitled to insist. On Tuesday, however, the plaintiffs' stevedore, in consequence of peremptory instructions from his principals, refused to continue this mode of discharge, and told the defendant's stevedore that on the next morning (Wednesday) they would commence to deliver in what they con-

sidered was the ordinary and rightful method, by hoisting up five or more bags at a time, placing them on the deck, wheeling them by a truck to the weigh-bridge, and delivering them on the weigh-bridge to the defendant, one bag at a time. The weigh-bridge, however, was not to be at the height of a man's shoulder from the deck. As to this Dorman says :—

"About 12.30 o'clock on Tuesday I got telegram from owners. [Read :] 'Must heave five bags at a time; steamer must finish discharge Thursday.' I went down and gave those instructions to the stevedore at the dinner-hour. Ross" (defendant's general manager) "and Miller" (defendant's outside manager, who was subordinate to the general manager) "were there. M'Caughey" (the ship's stevedore) "explained to Ross how it could be worked. To facilitate delivery M'Caughey said he would put two extra men on, with hand trucks, and take the grain bag by bag, as landed from the ship's tackles, and deliver on the merchant's weigh-bridge. Ross and Miller said they would take it away, so long as they got it on their weigh-bridge. I left, believing that arrangement to be definite."

On cross-examination, he said :—

"There was no intention of asking the consignee to receive five bags at a time. We never asked him to receive more than one at a time. . . . What I suggested was that five or six bags should be heaved up, landed on deck, and then trucked one by one to the weigh-bridge. For that purpose there should have been two weigh-bridges at each hold."

Patrick M'Caughey, the plaintiffs' stevedore, says :—

"We were talking about heaving five bags all the time the ship was working. Dorman mentioned it again on Tuesday."

Ross and Miller admit that this notice was given to them on the Tuesday evening. Ross says :—

"Dorman wanted to know would we receive it in heaves of five bags at a time. I said I did not care how he heaved, provided he put the bags one by one on the bridge *in the position it was sitting in*. That was the arrangement with which I left him. It saves the man half the time if he can get the bag off the weigh-bridge on to his back."

Miller's account of the Tuesday evening's conversation is :—

"I said I did not care how it was brought up, so long as it was landed on our stage, and weighed one by one, *so that the man could get it upon his back*."

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Such a change in the mode of discharge involved certain small changes in the gear used. Heavier gins or pulley-blocks had to be substituted for the lighter ones which had been used when the load from the hold was limited to one bag at a time; and the small weigh-bridge had to be removed from the position in which it had previously been, near the hold, as its presence in that position would have rendered hoisting from the hold of five bags at a time impossible. After the defendant's men left the ship on the Tuesday evening, the ship's stevedore effected these changes, and when the defendant's stevedore arrived at the vessel on Wednesday morning, the ship was duly equipped to hoist five bags at a time from each of the holds numbers 2 and 3.

There is much evidence as to what took place on the Wednesday morning.

Mr. Dorman says:—

> "On Wednesday morning I was at the ship early. I had arranged with the stevedore for a prompt start. M'Cann" (the foreman of Burns, defendant's stevedore) "was there, representing Gallaher. The stevedores got a heave of five bags, and landed them on the deck. They had several hand-trucks there. One bag was trucked to the weigh-bridge."

This, as explained to us by counsel, was a weigh-bridge placed in such a position as not to prevent the five bags being hoisted at the one time from the hold. It was not placed at the height of a man's shoulders from the deck.

> "I asked M'Cann to weigh and take delivery. He refused. He said, 'Put up our stage the way we had it, and give us the grain the way we were getting it.' I ordered the stevedore to place a bag on the ship's rail, and asked M'Cann would he take it there. At that time I saw Burns and Miller on the quay. . . . As no attempt was made to remove the bag from the rail, I told the ship's stevedore to employ men to carry it into the shed. All this time the bag was on the rail. Our stevedore went up the quay for men. When he came back, the bag was still there. The landing into the shed proceeded. We landed the bags on the rail first, hauling six at a time, and then putting them into the shed. . . . Two weigh-bridges would have received the grain almost as fast as we landed it in the shed. . . . There would be two weigh-bridges to one gang of ours if they adopted our plan."

As to this, M'Caughey's evidence is as follows :—

"When we were starting on Wednesday morning at No. 2 hold, Miller, Dorman, and I were there. Ross was not there. . . . When we were starting, the bridges were put on a stage on the deck on the ship's gangway; and when five bags came up, I made my foreman put one bag on one of their bridges. They said they would not weigh it; *that we had to put their stages on again* the way they had been getting. Dorman told me to put a bag on the ship's rail. They would not take delivery of it there; and Dorman sent me up the quay for men to put the cargo into the shed. Gallaher's men would not work for me. I started with the men I got, and landed into the shed from No. 2 hold. On the Tuesday, when talking about heaving five bags, they said they did not care, if one bag at a time was put on the weigh-bridge; but at 8 o'clock next morning they would not take it. On the Wednesday morning the winch at No. 3 hold was broken down till about 11, and then we started a heave of five bags there. There were no men of Gallaher's to receive it. Knowing the way we were working at No. 2, they would not go to No. 3."

The defendant stated :—

"We never would have got the cargo out of this particular ship in any reasonable time by hoisting. Therefore I insisted upon whipping. . . . The essential for my method was to have one single bag *put on an elevated stage*, so that it could go on a man's back. The more they have to lift the greater the delay. I objected to the hoisting plan because there would be much more delay."

Miller, on cross-examination, said :—

"The facility for lifting is the same on the rail as on the bridge."

The above evidence of Dorman and M'Caughey, as to the refusal of the defendant's stevedore to take the bags one by one from the stage where it had been placed by the ship's stevedore, or from the rail, is not contradicted. It is clear, therefore, that the position taken by those acting for the defendant was that the only thing they consented to was that the bags should be delivered at the height of a man's shoulder from the deck on the staging which they had erected, in the position in which they had placed it —a position which prevented five bags being hoisted at a time. There was, therefore—(1) a refusal to permit five bags being hoisted at a time; (2) a refusal to accept delivery at a stage

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which was not erected at the height of a man's shoulder; and (3) a refusal to accept delivery bag by bag on the ship's rail. These refusals, it is admitted, cannot be justified at common law, or otherwise than under some practice of the port; and the only practice of which evidence has been given which could justify it is that of "whipping." Two questions, therefore arise: first, whether the practice of whipping, upon which the defendant admits he insisted, viz., the taking the cargo from the hold bag by bag, and so delivering it, at the height of a man's shoulder, upon a weigh-bridge placed so as to render it impossible to hoist up five bags at a time, is binding upon the ship; and, secondly, if it is not, whether, having regard to the plaintiffs' representatives having adopted this mode on the Friday, Saturday, Monday, and Tuesday, they were at liberty to resort to the other and ordinary mode upon the Wednesday?

As to the first question, we are of opinion that the practice insisted on is not a practice merely of delivery, which is the only matter which is subject to be controlled by the custom or practice of the port. Instead of being confined to matters as to which the custom of a port can bind a shipowner, it extends to matters which are entirely within the control of the ship. We asked in vain for any authority that the taking of a cargo from the hold to the deck can be deemed to be part of the delivery. The shipowner sought to hoist the cargo five bags at a time, and, in the first instance, land them on the deck. When placed on the deck, the bags would still be in the custody of the shipowner. The joint operation of delivery, in which both the shipowner and the merchant were to take part, would not have commenced. Assuming, as for the purpose in hand we do, that the place on the deck at which the delivery should take place, and the number of bags that should be placed on the weigh-bridge at the one time, may be subject to be controlled by the custom or practice of the port, we are of opinion that the prior part of the operation, the bringing of the cargo from the hold to the deck, is an antecedent matter, in which the ship is not controllable by that custom or practice. We should have been of this opinion, were there nothing peculiar in the manner of the removal of the bags by the method of whipping. But (although it does not bear upon the legal question)

we desire to say that our opinion is much strengthened by the particular mode in which, according to that practice, the operation is performed. (1) The ordinary mode of using the winch is departed from. Instead of the barrel being used for coiling the rope, which undoubtedly is its ordinary use, the outside portions of the winch (the drums), which we are not satisfied were constructed with the view of being so used, are resorted to, simply because this wheat comes from Bombay, a port from which the bags are usually strong. (2) Again, the use of the winch is limited to drawing up a portion of the cargo of far less weight than that of its ordinary capacity; and (3) The operation is a peculiar one, requiring expert knowledge, which, upon the defendant's evidence, we have come to the conclusion is not possessed by the labourers usually employed by stevedores, even by such stevedores as are employed by the persons who insist on the custom. The defendant's stevedores, according to Mr. Burns's evidence, employ from 500 to 1000 men, of which about a dozen are practical whippers, to find whom Mr. Burns says he has had to search the whole docks.

We hold, then, as a matter of law, that the ship was not bound to adopt this practice of whipping; and, therefore, in our opinion, the defendant fails upon this, the second of the two broad questions involved in the case.

What, then, is the effect to be attributed to the ship having for four days discharged according to this mode? Are we to infer an agreement between Dorman (who, no doubt, must be deemed to have had full authority to bind the plaintiffs) and Gallaher, or those acting for him, to discharge the entire cargo by "whipping"? We have arrived at the conclusion that we cannot infer any such agreement. We are of opinion that Dorman's conduct, during the earlier part of the discharge, was the result of a belief upon his part that discharge by whipping was the usual custom of the port, which bound the plaintiffs. He did not, in our opinion, enter into any agreement whatsoever with the defendant, nor did the defendant with him. If, by reason of Dorman's permission that the discharge should at first be by whipping, the defendant had been induced to believe that an agreement had been entered into between him and Dorman to the effect that the entire

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discharge should be by that mode, and if, under that belief, he had gone to expense in making preparations for receiving the entire cargo in that manner, or had otherwise altered his position, a different consideration might have presented itself. It is, however, wholly inconsistent with the defendant's case that there was any such agreement. He relies on a practice which he alleges to be obligatory on the ship, without agreement, and in spite of objection. It would be fatal to his case were such a practice to be deemed to involve agreement. Further, the only changes necessary were effected easily and rapidly, by the ship, between Tuesday evening and Wednesday morning, without delay or inconvenience to the defendant.

The last argument is that although the entire operation of whipping may be one which could not be forced upon the plaintiffs, it was one which was capable of being separated into parts, and that so much of it as related to the delivery to the merchant, bag by bag, on the weigh-bridge placed at the height of a man's back, was valid, and bound the plaintiffs.

There are, however, two answers to this. The first is that it could not affect the result in the present case. Even were there a practice to that effect, the plaintiffs would still have been entitled to hoist the cargo from the hold five bags at a time, and place them on the deck. Therefore the defendant's act of refusing to receive, unless the weigh-bridge were in a position which would prevent this number of bags being so hoisted and placed on the deck, was a breach of contract (even though it may have contained a further term that *after* they had been so hoisted they should be delivered at a particular height above the deck), and this breach would have entitled the plaintiffs to deliver into the shed. The second answer is that the only evidence given to prove the practice of delivering at the height of a man's shoulder is the evidence of the practice of whipping as one entire indivisible operation, of which both the mode of taking from the hold, and the height at which the bag is to be delivered, are connected and dependent parts. The alleged advantage of the practice arises solely from the combination of both. There is no evidence of a practice of using one part and rejecting the other; and if the entire practice cannot (as in our opinion it cannot) be forced on an unwilling

shipowner (who did not contract in reference to it), *a fortiori* it is impossible to bind him by a part of it.

A question has been raised by Mr. Ronan, founded upon the bill of lading providing for delivery "from the ship's tackles." Such words are, in our opinion, inserted in a bill of lading in the interest of the shipowner, to prevent delivery being insisted upon beyond reach of the tackles; and do not, in the absence of custom, prevent delivery on the ship's rail, when part of the transit from the hold to the rail, which is along the deck, is effected by trucks. But this also is a question which does not arise, because the defendant's breach of contract arose before the bags left the tackles. During the numerous discussions during the delivery this point was never mentioned.

On this one question (out of the many difficult ones raised before Lord Justice Fitz Gibbon, and before us) we feel ourselves unable to agree with him; and notwithstanding the great diffidence which necessarily is incident to this difference of opinion, increased as it is by Mr. Justice Madden also differing from us, the plaintiffs are entitled to our opinion, subject to any infirmity to which it may be incident.

In result, then, we are of opinion that, upon the Wednesday morning, the defendant committed two breaches of his contract—(1) by preventing the plaintiffs bringing the wheat from the hold by hoisting five bags at a time; and (2) by refusing to accept delivery of the bag which was placed on the ship's rail. These breaches of contract are open to the plaintiffs on the 4th and 5th paragraphs of the claim, and were relied on at the trial. In our opinion, each of them entitled the plaintiffs to deliver the then undelivered part of the cargo into the shed, and to recover as damages the expenses thereby incurred. No observations were addressed to us in reference to the amount of those expenses, which appears to be admitted, or to their amount being the proper measure of damages.

We are therefore of opinion that the first, second, and third findings mentioned in the Registrar's certificate ought to be limited to such of the causes of action as accrued, prior to or on Tuesday, the 2nd January; that the fourth finding, which relates to the custom of the port, should be struck out; and that, as to the

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residue of the causes of action, we should find that the defendant did not take delivery of the cargo according to the terms of his contract or with reasonable despatch, and without delay; that we should assess damages in respect of such last-mentioned causes of action at £79 9*s.*, and that upon this verdict judgment should be entered for the defendant with costs in respect of the causes of action which accrued on or prior to the 2nd of January; and as to the residue of the causes of action, for the plaintiffs, with £79 9*s.*, damages and costs. The costs of this motion will be each party's costs in the action.

MADDEN, J.:—

Although I have the misfortune to differ from the other members of the Court, I have the satisfaction of knowing that the difference of opinion between us is not on any question of law, but as to the conclusion which ought to be drawn from certain facts proved in the case. In the first paragraph of the statement of defence, the defendant pleads that he took delivery of the goods in question with reasonable despatch, and that it was not by reason of any breach of contract, or any act of the defendant, that the plaintiffs were detained. In my opinion, the evidence sustains this defence. On all the other questions raised in the case, I entirely concur with the judgment of the Lord Chief Baron and of my brother Kenny. Jurors, in answering a question such as that raised by this defence, enjoy a privilege which is denied to a judge—that of giving a decision without stating their reasons. The parties are entitled to a statement of the reasons upon which my judgment is founded; but I shall make this statement as short as possible, and I shall deal only with the single questions as to which there is a difference of opinion between the members of the Court.

I shall not recapitulate the facts of the case, which have been fully stated by my Lord Chief Baron. The crucial dates are Tuesday evening and the following day—on this we are all agreed—but in order to appreciate the occurrences of those days, it is necessary to go back to the commencement of the discharge of the cargo. The cargo consisted of Bombay grain, a commodity which is carried in bags of exceptional strength, each containing 2 cwts. I am satisfied, on the evidence, that a cargo of

this kind is ordinarily discharged by the process known as whipping. The nature of this process has been described in the evidence, and in much clearer language in the judgment which has been just delivered. The essential difference between whipping and hoisting, from the point of view of the consignee, consists in the mode of delivery. When whipping is adopted, each bag taken separately from the hold is delivered at a weigh-bridge, placed on a stage at an elevation sufficient to enable a man to take each bag on his shoulders, and to carry it away when weighed. When bags are hoisted five at a time, they must be first placed on deck, released from the rope, brought separately to the weigh-bridge on a stage only a few inches above the level of the deck, from which they would have to be lifted and carried away after being weighed. It is easy to understand why whipping is specially adapted to a cargo like Bombay grain, carried in large and strong bags. In the case of smaller and weaker bags the discharge of the cargo would be unreasonably delayed by the delivery of each bag singly, and the danger of injury to the bag, in the operation of whipping, as explained to us, would be obviously greater. As a matter of fact, I should have been prepared to accept the following statement of Francis Burns, senior, even in the absence of the corroboration which it has received from the correspondence: "I never knew a Bombay cargo of wheat discharged by hoisting before the 'Aboukir,' but since. When she was discharged, whipping was the usual and customary mode of discharging Bombay wheat in Belfast. I had never known any other." Graham's evidence on cross-examination is really to the same effect. With the exception of two special instances, he says: "I never knew an Indian cargo discharged except by whipping single bags." But the strongest evidence, to my mind, is afforded by the conduct of both parties in regard to the discharge of the "Aboukir." When the discharge began, the derricks were adjusted for whipping, and the stages and weigh-bridges placed on deck, in a manner adapted to this mode of delivering. While the discharge was proceeding, Messrs Glenn, on behalf of the owners, addressed to Dorman and Co., who were acting in Belfast as the owners' agents for the discharge of the cargo, communications written under a total misconception of the legal rights

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of the parties, but which, to my mind, throw some light on the subsequent transactions. On the 31st they wrote to Dorman that "the boat must be discharged at the full rate of speed." Dorman, in reply, pointed out that the owners were only entitled to reasonable despatch. Whereupon Messrs. Glenn telegraphed on the 31st: "This rate discharge useless; start landing and shedding cargo at once. Put in maximum number of gangs: you simply must rush cargo out." Other telegrams passed; and by a letter of the 1st January, addressed to Dorman, Messrs. Glenn took up the extraordinary position that the owners would be entitled to put out the whole cargo in a single day, if they could manage to do so.

Meanwhile the process of whipping was being adopted, without any protest on the part of Dorman. I accept the statement of Samuel Ross, the defendant's general manager, that "there was no talk whatever with me about hoisting in heaves until that Tuesday evening." It would have been strange if there had been any such talk on the part of Dorman, having regard to his letter to Messrs. Glenn of the 2nd January in reply to their letter, which I have referred to: "We have to-day your letter of 31st ult. The cargo is being weighed on deck, as customary, one bag at a time, and then carried away; and as ship has to land the bag on weigh-bridge, merchants will only receive the cargo in this way, and consequently only one bag at a time is winched. We have made inquiry from other sources, and we find that this is the usual course adopted."

I am satisfied by the evidence that this was not only the usual course adopted, but that it was a reasonable mode of discharge having regard to the amount of the cargo. On Monday morning 37,831 bags remained to be discharged. I conclude from the evidence that if whipping had been properly carried out each gang could have discharged from 120 to 150 tons per day of ten hours by which process the ship would have been cleared on Saturday. In the words of the Lord Justice, I am satisfied upon the evidence as a fact "that the cargo could have been discharged thereby" (that is by whipping) "with reasonable despatch, if that method had been efficiently carried out, and that the defendant and his servants had carried it out with reasonable efficiency and despatch

with respect to the portion of the cargo which was discharged by them." The whipping was not, I believe, efficiently done by the plaintiffs' servants, and I attribute the action taken on behalf of the plaintiffs on Wednesday, January 3rd, partly to the delay for which they are responsible, and partly to the unwarrantable attitude taken up by Messrs. Glenn in directing Dorman to rush the cargo out of the ship.

The use of the word "custom" in the 5th paragraph of the Registrar's certificate has been commented on. I do not conclude from the Lord Justice's report that he attributes to the practice of whipping the legal incidents of a binding custom. I do not go so far as to hold that whipping has been shown to be a legal custom, and obligatory on all persons in the discharge of a cargo of Bombay corn in the port of Belfast. It is a mode of discharge customary in the case of a certain kind of grain cargo, and adopted as such by both parties in the present case. The essential part of this mode of discharge is the delivery on the bridge at a certain height, not the process by which each bag is brought out of the hold. This delivery is most rapidly and effectually carried out by whipping; and, accordingly, this mode of clearing the hold is adopted. Samuel Ross, the general manager of the defendant, referring to the interview on Tuesday evening, when hoisting was first mentioned, says—"I had a talk with Dorman on board the steamer. He wanted to know if we would receive it in heaves of five bags at a time. I said I did not care how he heaved, provided he put the bags one by one on the bridge, in the position it was sitting in. That was the arrangement with which I left him. It saves the man half the time if he can get the bag off the bridge on his back." In accordance with this evidence the Lord Justice finds "that the defendant was at all times ready and willing to take delivery, and did in fact take delivery of all corn which the plaintiffs by their servants offered for delivery at the proper place and in the proper manner." He also finds that when the plaintiffs, by their servants, on Wednesday and on Thursday tendered bags for delivery which the defendant, by his servants, refused to accept, the bags were not placed in the usual or customary position, nor where they could be weighed, lifted, or carried away with reasonable facility or despatch." There was certainly no

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delay on the part of the defendant in taking delivery of the cargo, so long as it was delivered in the method which, according to Dorman, is the only method in which merchants will receive a cargo of this kind—that is to say, by landing the bags upon a weigh-bridge, one at a time. I am satisfied that if this method had been continued the defendant would have taken delivery of the residue of the cargo with reasonable diligence, and that if the plaintiffs' servants had done their part of the work efficiently, the cargo would have been completely discharged in a reasonable time. The defendant was, in my opinion, guilty of no default or breach of contract in refusing to take delivery of the cargo, which was, in Messrs. Glenn's emphatic language, simply rushed out at the full rate of speed, and delivered in a manner in which, according to the plaintiffs' agent, Dorman, no merchant would receive a cargo of the kind. I am, therefore, of opinion that the defendant is entitled to retain the judgment which has been given in his favour.

J. G. T.

Appeal. May 13–15. June 17.

The defendant appealed (1).

Ronan, K.C., Gordon, K.C., and *Hanna*, for the appellant :—

The customary practice at a port can regulate the mode of delivery of the goods from the ship's hold. We were always ready and willing to receive the cargo if the plaintiffs delivered it at the height of a man's shoulder. The *onus* is on the plaintiffs to show that they delivered the cargo to the defendant in a way that the defendant was bound to accept it. They have not done so, and the Judge has found there was evidence to support the custom. The charter-party is to deliver the cargo at a named port, and the cargo must be discharged as is customary there: *Postlethwaite* v. *Freeland* (2). The defendant was entitled to have the cargo brought up by "whipping"; even if that was not so, the defendant was entitled to have the cargo delivered at the height of a man's shoulder. If the charter-party is silent as to the time to be occupied in the discharge, the contract implied by law is that each party will use reasonable diligence in performing that part of the

(1) In the Court of Appeal, before the LORD CHANCELLOR, LORD O'BRIEN, L.C.J., and HOLMES, L.J.

(2) 5 A. C. 599, 613.

delivery which, by the custom of the port, falls on him: *Ford* v. *Cotesworth* (1); *Goo l* v. *Isaacs* (2).

If both parties start with delivery in a certain way, and no one has anything to complain of in the way it is done, it is not open to either party to change the method.

The Right Hon. J. H. Campbell, K.C., Chambers, K.C., and *M'Gonigal,* for the respondents:—

A shipowner would not be bound by a custom of a port which would impose special duties on him, not ordinarily implied in the contract, unless it could be shown that he entered into the contract with notice of the custom. The consignee cannot by any practice regulate the mode in which the shipowner should bring the goods from the hold of his ship to the point where he makes delivery to the merchant: *Petersen* v. *Freebody* (3). Discharge should be effected with the utmost despatch practicable, having regard to the custom of the port, the facilities for delivery possessed by the particular vessel under contract of affreightment, and all other circumstances in existence at the time, not being circumstances brought about by the person whose duty it is to take delivery, or circumstances within his control: *Hulthen* v. *Stewart* (4). The practice relied on is unreasonable, because it has no regard to the facility for discharge possessed by the particular ship. The evidence given by the defendant in favour of whipping was not sufficient to establish that as the customary mode of discharge at the port. There was no evidence given by the defendant of a practice to receive delivery of a cargo of Bombay wheat in bags on a raised platform at the height of a man's shoulder.

June 17.

THE LORD CHANCELLOR:—

The claim of the plaintiffs in this action is of a twofold character—(1) Damages to the amount of £107 8*s.* for detention of the ship for three days beyond the time necessary for the discharge of the cargo; and (2) a claim for the sum of £79 9*s.*, expenses consequent on landing and warehousing in sheds portion of the cargo, rendered necessary, as alleged, by reason of the defen-

(1) L. R. 4 Q. B. 127.
(2) [1892] 2 Q. B. 555.
(3) [1895] 2 Q. B. 294.
(4) [1903] A. C. 389.

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dant's refusal, in breach of contract, to take the cargo as soon as the ship was ready to discharge it.

It will be seen that the claim for detention has been finally disposed of in favour of the defendant.

In addition to other defences, the defendant pleaded that it was an implied term of the contract that the defendant should take delivery according to the custom of the Port of Belfast in respect of grain cargoes, and that the cargo was taken delivery of in accordance with this custom on which defendant relied.

This custom, in answer to a notice requiring particulars of it, was stated to be one that a steamer of the burden of plaintiffs' vessel should be discharged at the average rate of not less than 500 tons per day.

The case was tried by Lord Justice Fitz Gibbon without a jury.

It appears that the discharge of the cargo commenced on the 29th December, and continued in a manner sanctioned by mutual arrangement down to the evening of Tuesday, the 2nd January. The Lord Justice has found, and the Divisional Court has concurred in his conclusion of facts as to this period, that no delay occurred for which the defendant is responsible, and we have no appeal before us in reference to this part of the case.

But the learned Lord Justice in his conclusions of fact and law went further. He decided as matter of law that the custom relied on by the defendant in his pleading was unreasonable, and did not bind the plaintiff, and this ruling is not questioned; but, in the course of the case, another custom was started which found favour with the Lord Justice, and, supported by this, he found that the claim made by the defendant in respect of the manner of delivery on the evening of Tuesday, 2nd January, and thenceforward on the 3rd January, until the balance of the cargo was landed and warehoused by plaintiffs, was valid and lawful, and that consequently the defendant was right throughout, and entitled to have judgment entered in his favour. The three findings which appear in the certificate covering this part of the case are:—(3) That the defendant was ready and willing at all times to take delivery of the said cargo according to the terms of his contract; (4) That the defendant took delivery of the said cargo as soon as

the said ship was ready to discharge the same; (5) That delivery of the said cargo so far as the plaintiffs permitted the defendant to take delivery thereof was taken by the defendant according to the custom of the Port of Belfast and in a reasonable manner.

This custom was of course not the one which he had himself held to be unreasonable; but one, as stated in his report, relating "exclusively to the method of discharge by whipping and weighing single bags, and lifting and carrying them from the ship"; and it was this alleged custom of whipping to which the argument on the present appeal was mainly directed, its existence, its extent, and lawfulness against the shipowner.

The judgment of the Divisional Court under appeal shows clearly the point at which the disagreement with the findings of the Lord Justice begins.

After deciding everything in favour of the defendant up to the evening of Tuesday, the 2nd January, it proceeds—No. 4: "That from and after Tuesday, the 2nd January, the plaintiffs were ready and willing to deliver the residue of the cargo of the said steamship according to the terms of their contract, but the defendant did not take, nor was he ready and willing to take, delivery thereof according to the terms of the said contract, and by reason thereof the plaintiffs incurred expense (to the amount of £79 9*s.*) in storing the said residue." And 5: "The Court doth accordingly find for the plaintiffs in respect of such of the causes of action as accrued on and after Wednesday, the 3rd January, 1906, with £79 9*s.* damages, and for the defendant upon such of the alleged causes of action as accrued prior to the said 3rd January, 1906"; and it then gives judgment with costs for each side upon the basis of these findings.

The appeal of the defendant asks that the finding of the learned Lord Justice and his judgment should be restored.

It is very material to know clearly what happened on the evening of Tuesday, the 2nd January, and morning of Wednesday, the 3rd January, when the parties stood upon what they considered were their legal rights, and the discharge into the sheds began.

This was a cargo of Bombay wheat carried in bags said to be stronger than those used in other cases; and up to the date I have

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mentioned, it had undoubtedly, by mutual arrangement, been delivered according to a practice known by the name of "whipping," which practice the defendant contends is, as regards the delivery of Bombay wheat in the Port of Belfast, binding on every shipowner. The judgment of the Lord Chief Baron contains a lucid explanation of this mode of delivery, to which I could not hope to add anything. He said—"It is essential to this mode that one bag only of the cargo shall be hoisted from the hold by each rope at the one time, instead of several bags being hoisted up together, as is usual in other modes of discharge. Instead of the hoisting being effected by means of a rope coiled round the barrel of the winch and the bags hoisted being then deposited on the rail or deck from the tackles of the ship (the rope being then uncoiled and allowed to drop back into the hold)—instead of this, the ordinary mode, thinner ropes (of which one or two, but not more than two, can be used at a time) are run through smaller gins or pulley-slots than are ordinarily used, and are worked upon the outer edges or drums of the winch, instead of on the barrel. The winch is kept continuously revolving in the same direction. A single bag is lightly attached in the hold to the rope, or to each of them if there be two, by means of a smaller rope called 'a sling,' detachable from the other, and is brought by the tackles of the ship to a point above a weighing-machine (sufficient to weigh a single bag only at a time) which is placed at the height of a man's shoulder from the deck, being (in such a ship as the 'Aboukir') on a staging on the deck near the hatch, or (where two ropes are being used) on two stagings one at each side of the hatch. To be placed on this weighing-machine, the bag is removed from the tackle by a peculiar motion or jerk known to experts in this mode of discharge, but not to ordinary stevedores. Thus the bag, when weighed, is in a position in which, with a minimum of labour, it can be lifted by the stevedore. Delivery in this manner upon such a weigh-bridge is, when this practice is resorted to, deemed to be a delivery to the merchant, and the bag, having been weighed, is carried on shore by the merchant's stevedore. The peculiarities of this mode of discharge are: 1st—The parts of the winch used are the drums, not the barrel; 2nd—The winch continues to revolve in one direction, instead of alternately in opposite

directions, as in ordinary hoisting; 3rd—One bag only can be taken by each rope at a time from the hold, and as more than two ropes cannot be used at the same time, the discharge is limited to two bags at a time; 4th—Each weighing-machine must be close to the hatch, as one rapid motion of the stevedore has to carry the bag from the sling to the weighing-machine; 5th—The weighing-machine must be at about the height of a man's shoulder from the deck."

I do not consider it material to go into the relative merits in the way of despatch as regards delivery between "whipping," and the mode which the plaintiffs insisted on their right to resort to on the Wednesday morning, viz., that they would deliver by hoisting up five or more bags at a time, placing them on deck, wheel them on a truck to the weigh-bridge, and deliver them on the weigh-bridge to the defendant, one bag at a time; the weigh-bridge not being at the height of a man's shoulder from the deck, but only, it was said, four inches.

We were strongly pressed that, on the evidence, the defendant did not object to this hoisting; but, in my opinion, the conditions made the hoisting impossible. Ross said: "I said I didn't care how he heaved, provided he put the bags one by one on the bridge in the position it was sitting in"; and Miller said: "I said I did not care how it was brought up, so long as it was landed on one stage, and weighed one by one, so that the man could get it on his back."

They refused to weigh the bags unless these stages were put on again in the way they had been getting it. Next it was offered to them at the ship's rail, but they refused it there. In effect, therefore, it comes to what the Chief Baron says—(1) There was a refusal to permit five bags to be hoisted at a time; (2) a refusal to accept delivery at a stage which was not erected at the height of a man's shoulder; and (3) a refusal to accept delivery bag by bag on the ship's rail.

There is, I think, no doubt, on the Lord Justice's report, as to the ground he assigns for justifying the defendant's action. He says: "I found as a fact upon the evidence that whipping was the customary mode of discharging Bombay wheat in bags at Belfast, and that the cargo could have been discharged thereby

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with reasonable despatch if that method had been efficiently carried out, and that the defendant and his servants so carried it out"; and on Wednesday and Thursday, when the plaintiff "tendered bags for delivery which the defendant refused to accept, the bags were not placed in the usual or customary position, nor where they could be weighed, lifted, and carried away with reasonable facility or despatch, and therefore the plaintiffs were not entitled to put the corn into the sheds as they had done." He adds later on: "The findings in my certificate as to the custom of the port relate exclusively to the method of discharge by whipping and weighing single bags, and lifting and carrying them from the ship—as carried out by the defendant"; and his findings were intended to decide "customary" in Belfast in favour of the defendant.

The question remains whether this is binding upon the shipowner. There is a preliminary question connected with this, hardly discussed here, viz., whether the fact of whipping having been by mutual arrangement adopted up to Tuesday precluded the plaintiffs on the Wednesday from resorting to their contract rights, if they had any different ones. Upon this I do not desire to add anything to the Chief Baron's judgment. It is not suggested that any expenditure had been gone to upon the faith of that dealing, or that anything had taken place amounting to an estoppel.

There are three incidents all through in this alleged custom—(1) The manner of taking from the hold; (2) the weighing one bag at a time; and (3) the delivery from the weigh-bridge at the height of a man's shoulder by means of the raised staging.

It is not suggested that there was a custom so to deliver apart from the custom of whipping. It cannot be reasonable to compel a shipowner to discharge without taking into account the appliances he has. He may not have the suitable winches, or a crew able to adopt the practice. He might possibly have no winches. It would be unreasonable to impose on the shipowner in his own ship any obligation as to the mode by which he would take the cargo from the hold of his ship, and give it to the merchant, or prevent him delivering it at the ship's rail. It appears in the present case that the mode of taking the cargo from the hold by whipping

did not suit the winches and use of the drums for that purpose. The merchant here, while appearing to acquiesce in the hoisting of five bags at a time, knowing probably that he could not so far control the shipowner, attached a condition which made hoisting impossible.

It seems to me impossible to split up this practice of whipping into parts. The custom must be either good or bad in its entirety, and it is in its entirety the Lord Justice has found it; and it must bind the shipowner as a whole or not at all.

The effect of the defendant refusing to receive the cargo, unless the weigh-bridge was in a position which, as a result, prevented the bags being hoisted and placed on deck, was in my opinion a breach of contract and entitled the plaintiffs to deliver into the sheds. It will be remembered that there was also an offer to deliver at the ship's rail, which was refused.

I do not think it necessary to add anything as to the point about "delivering from the ship's tackle." This is plainly a condition inserted for the benefit of the shipowner.

I am inclined to agree with the Lord Chief Baron that the custom of whipping insisted on did curtail the legal rights of the shipowner as regards the hold of his own ship and its use; but as a universal custom it seems to me unreasonable, because it pays no regard to the appliances and facilities which might exist in the ship, and the class of labour necessary to be employed; and I also agree with what I understand to be the main ground of Lord Justice Holmes's judgment that the evidence in this case was not sufficient to establish it.

I think the appeal must be dismissed.

Lord O'Brien, L.C.J.:—

I agree in the result arrived at by the Lord Chancellor, and for the same reasons. I feel, indeed, that it is unnecessary to add anything to what he has said; but as a question of general importance was raised at the trial, perhaps I may be permitted to say something. In the most formal way in the pleadings, and by explanatory notice, a certain custom was relied upon by the defendant—a custom that not less (which, it must be borne in mind, the defendant insisted meant not *more*) than 500 tons of wheat should

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be delivered out of the ship *per* day. It is only necessary to state the nature of this alleged custom as interpreted by the defendant to show how important it was. Yet this custom, championed in the most formal way by the defendant—in fact, the case was substantially defended to maintain it—was found at an early stage of the trial not to be sustainable, and was, in fact, abandoned. Then came the struggle for whipping—for the so-called customary practice of "whipping." The custom originally claimed, that is to say, that not less than 500 tons—which I again repeat was interpreted by the defendant as meaning not *more* than 500 tons—should be discharged *per* day, might be fraught with great advantage to the merchant, and the most serious consequences to the shipowner. The merchant might, if the rate of delivery was so limited, use, or endeavour to use, the ship as a warehouse, and the shipowner might have his ship seriously delayed, when there were other engagements to fulfil. Mr. Campbell pressed with a very persistent energy that the true object of the defendant in this case was to delay the delivery, and elaborately dealt with the motives he alleged were operative with him—motives which he asserted influenced him not only as regards the custom originally asserted, but as regards also the so-called customary practice of whipping, having regard to the difficulties attending it on a ship not specially equipped for the purpose, either in men or appliances. The defendant, on the other hand, retorted that all blame in the matter was attributable to the action of the plaintiffs—that the practice of whipping had been pursued for four days, and that then, owing to the exigencies of the ship's engagements, the plaintiffs unjustifiably insisted on abandoning that practice, and resorting to hoisting. It will be remembered, however, that whipping was not the custom alleged in the pleadings; that the custom put forward in the pleadings was that not less, interpreted by the defendant as not more, than 500 tons should be discharged *per* day. There was no specification of whipping as a mode of delivery put forward in the pleadings, though it is now insisted that the cause of the litigation is that the plaintiffs refused to continue that mode of delivery, which is alleged to be customary, reasonable, and binding. However, putting aside for the present the charges and countercharges respectively, I think the plaintiffs are entitled to a decision

in their favour on the ground that whipping, which was dealt with as one entire thing, was not a reasonable custom, or customary practice, binding on the ship, inasmuch as it would affect its internal economy before the point of delivery was reached, and would require special appliances and a specially trained crew; but, assuming whipping could be a valid custom or customary practice, I do not think there is anything in the case at all approaching to the full body of evidence required to establish it. The Lord Chief Baron states in his judgment that he asked in vain for an authority that the taking of cargo from the hold to the deck could be deemed part of the delivery. I ventured during the argument more than once to make the same request, but we were referred to no such authority. *Good* v. *Isaacs* (1) is not, in my opinion, an authority for any such proposition. It is quite plain that the learned Lord Justice dealt with this practice of whipping as a whole, as one single, indivisible thing. He used in his report the language referred to by the Lord Chancellor, and Mr. Ronan insisted that there was an obligation to bring up the bags from the hold, to whip from the hold, in the manner described, though he said it was not necessary for him to go so far in this case; but the learned Lord Justice dealt with the practice as affecting the hold as well as the deck, and did not find, as pointed out by Mr. Campbell, that there was any customary practice confined merely to putting the bags on a staging on the deck at the height of a man's shoulder. It is to be remembered also that the Lord Justice did not, and I think rightly, find that there was any binding agreement—any contract between the respective stevedores—that the delivery should take place by whipping, or by any integral part of whipping, such as by placing the bags on a staging at the height of a man's shoulder; nor was there in the case any ground for alleging that the plaintiffs were estopped from denying that whipping was a mode of delivery binding upon the ship. The defendant, in my opinion, was not justified in insisting upon this practice of whipping, which was clearly inconsistent with and obstructive of hoisting or heaving; and as the method of delivery proposed by the plaintiffs was reasonable

(1) [1892] 2 Q. B. 555.

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and in keeping with the character of the ship, and not dilatory, and that insisted on by the defendant unreasonable and unsustainable, and not binding on the ship, the decision appealed from should, in my opinion, be affirmed.

Just a word as to the telegram so much relied on as to rushing out the cargo. No doubt the plaintiffs pressed forward the delivery of the cargo, in order that the ship might fulfil her engagements; but the risk of the ship not being able to fulfil her engagements was caused by the defendant's obstruction of the discharge, of the cargo by insisting on an improper mode of discharge, and by reason of the defendant not providing adequate gangs. The plaintiffs were apparently apprehensive—an apprehension for which I think there were good grounds—that it was sought to make the ship serve the purpose of a warehouse or store.

I am of opinion that the appeal should be dismissed.

HOLMES, L.J.:—

On the 28th December, 1905, there arrived in the Port of Belfast the plaintiffs' steamship "Aboukir," laden with about 4500 tons of Bombay wheat, which the defendant, as the indorsee of the bill of lading, was entitled and bound to receive. The discharge of the cargo began on Friday, the 29th of December, and the vessel was cleared on Saturday, the 7th January. From the first there was a controversy between the parties about the rate of discharge, the plaintiffs alleging that they were entitled to deliver the cargo with the greatest speed possible, and the defendant contending that by the usage of the port he could not be compelled to accept more than five hundred tons a day. It is now admitted that both parties misconceived their respective rights in this respect, and that while both were obliged to use reasonable despatch, neither could insist on more or less than this. There is one matter of some importance, as to which there was no difference of opinion, during the discharge or subsequently. It was assumed that delivery to the merchant was to be given by placing the bags one at a time on the latter's weigh-bridges on the deck of the vessel. The shipowner's duty ended when the bag reached the weighing-machine from which, after having been

weighed, it was to be brought to the quay by the defendant's men. There are in the "Aboukir" four holds, of which Nos. 1 and 4 are small with a single winch for each, while Nos. 2 and 3 are larger, having each two winches. During Friday, the 29th, and the Saturday, Monday, and Tuesday following, the winches were used for raising the bags from these holds by a process called "whipping," which I shall presently describe; but on Wednesday morning there was substituted in the case of the large holds another method known as hoisting or heaving, which necessitated, or at least was accompanied by, the plaintiffs' men changing the position of the weigh-bridges. The defendant's representatives thereupon refused to take delivery of the bags on these bridges in their new position, and the plaintiffs' stevedore had them sent direct to the quay and placed in a goods store or shed thereon. Hence the present action, the first claim in which is for damages arising from delay and want of reasonable despatch on the part of the defendant in taking delivery. There is then an alternative claim for the expenses incurred by the plaintiffs in landing and warehousing the goods on Wednesday and the following days. FitzGibbon, L.J., who tried the case without a jury, gave judgment for the defendant on both causes of action; but the Divisional Court has held the plaintiffs entitled to recover £79 9*s.* the cost of landing and storage. This is the only matter in controversy in this appeal, and it turns upon whether the defendant was entitled to refuse delivery in the manner in which it was offered on Wednesday morning. If he was, he cannot be made answerable for expenses which would not have been incurred if the plaintiffs had performed their contract by delivering their cargo in accordance therewith. If he was not, the landing and storing were the consequence of his own breach of contract, and he must make good the loss which the plaintiffs incurred by reason thereof. The solution of this question depends, in my opinion, on the answer to be given to another—Were the plaintiffs bound by the practice and usage of the port to raise the bags of grain from the hold by the whipping process? This was, I think, the real matter in controversy on this branch of the case at the trial; and although Mr. Ronan has argued that it is not required for the defence, I hope to show that it is an essential part of it.

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The process of whipping will be best understood by contrasting it with the more usual method of heaving or hoisting in which the bags are elevated by means of a rope coiled round the barrel of the winch. In this way five or six bags are brought up at a time and placed on the deck, the winch stopping while the bags are detached from the rope, which is then allowed to drop back into the hold so as to repeat the process. In "whipping" two ropes are worked by the outer drums of the winch, which is kept continuously revolving in the same direction; but each rope can only raise one bag at a time. If this were the only difference between the two processes, it is difficult to see why either owner or merchant would prefer "whipping"; but that method has the advantage of placing the bag directly on a weighing-machine, raised on some kind of staging, three or four feet above the level of the deck, thus making it an easy job for the merchant's men to land it on the rail or quay by placing his shoulder under it. This cannot be done in the hoisting process, for when the five or six bags are detached from the tackle on the deck they must be trucked to the weigh-bridge and placed thereon one at a time by the shipowners' men; and the plaintiffs contend that in carrying out this operation, it is only necessary to stage the weigh-bridge a few inches above the deck. The foregoing statement explains the nature and essence of the controversy that arose on Wednesday morning. The shipowners' stevedore, having given due notice the previous evening, began to heave five or six bags at a time from the two larger holds, and to truck them to the weigh-bridges, which were placed on very low stages in a different part of the deck from those on which they were standing before. No formal objection was taken to the mode in which the bags were taken from the holds. In fact, the defendant's representative said that this was a matter with which they were not concerned, but they insisted that delivery should be given by placing them one at a time on weigh-bridges placed high enough to enable their men to put their shoulders under them. This was not acceded to by the agent of the shipowner, and therefore the defendant refused to accept delivery. Now I am satisfied that the only reasonable and practical way of doing what was required by the defendant was by the whipping process. I infer from the evidence that this

method of delivery gives reasonable despatch if the ship's winches are suited to it, and the men engaged are skilled in working it, but that a more rapid discharge can be effected by hoisting in the manner proposed on the Wednesday morning, although probably this would require more hands. I also draw the further inference that if hoisting is used it is practically impossible to place the bags on elevated weighing-machines. To do so would cause so much trouble and inconvenience, and would so retard the delivery, that I cannot believe it to have been ever attempted. Therefore I hold, notwithstanding Mr. Ronan's argument to the contrary, that what was required by the defendant involved the continuance of "whipping," and that the real point for decision is whether the usage or practice of the port imposed on the shipowner an obligation to raise bags from the hold by this process.

The Lord Chief Baron decided that a shipowner cannot be controlled in the mode of taking the cargo from the hold of his vessel to the deck by any usage or practice of the port. I am not prepared to go as far as this. Delivery to the merchant may be regulated by custom; and I think a process so closely connected therewith as "whipping" might possibly be made a term of the contract by evidence of usage.

I am, however, of opinion that the evidence given at the trial was wholly inadequate for this purpose. The practice proved relates only to grain cargoes from Bombay, and comparatively few vessels with such cargoes are discharged in Belfast. Even if in all such cases the process of whipping was used, they would fall far short of the number necessary to prove a practice binding on shipowners; and it is not shown that this process was constant and invariable. On the contrary, it was proved that in case of some ships similarly laden, the bags were heaved or hoisted. But even if this kind of evidence was much stronger, it is necessary before incorporating the usage of the port in the contract of discharge to have regard to the possibility or facilities for carrying it out in the instance to which it is sought to be applied. It was convincingly proved by the defendant and his witnesses that during the first four days the despatch by the shipowner was much below what might have been expected if the whipping had been effective. In fact, it was this evidence that enabled the

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defendant to succeed on the claim for unreasonable delay. But why was it not effective when the plaintiffs' agent and stevedore were endeavouring so far as possible to expedite the discharge? It is clear that the reasons were—(1) because the winches were not well suited for whipping, and (2) because men skilled in this method were not available. The ordinary dock-labourer does not understand the process; and there are very few hands in Belfast who can work it properly. Mr. Burns, the stevedore in the most extensive business in Belfast, employs between 500 and 1000 men, of whom only about a dozen are good whippers; and for them he has to search all the docks. Burns acted as the defendant's stevedore, and he had sought unsuccessfully to be employed in the same capacity by the plaintiffs. His experts were therefore not available for the discharge, and others were not forthcoming. Therefore it was impossible for the shipowner to deliver the cargo with reasonable despatch by means of "whipping." In these circumstances I cannot see how an obligation to "whip" can be imported into the contract between the parties.

I have confined myself to the only part of the case open on this appeal, and, having dealt with the principal ground of defence relied on, I have only to add, in reference to Mr. Ronan's argument from the provision in the bill of lading for delivery from the ship's tackles, that on both principle and authority this term of the contract is introduced solely in the interest and for the benefit of the shipowner, and cannot be insisted on by the merchant.

Solicitor for the plaintiffs : *Martin J. Burke.*
Solicitors for the defendant : *Carson & M'Dowell.*

R. D. M.

DOMVILE AND OTHERS *v.* CALLWELL AND OTHERS (1).

(1905. No. 5430.)

K. B. Div 1906. Nov. 22, 23, 26. 1907. Feb. 18.

Landlord and tenant—Lease for three lives—Covenant by landlord to renew within a limited period, on tenant nominating a new life on the dropping of each life successively—Nominations—Renewal—Evidence—Declarations against interest—Omnia praesumuntur rite fuisse acta.

A lease for three lives, dated 1st August, 1811, contained a covenant that the lessor, upon the death of the lives or life within a term of seventy years, and on the nomination by the lessee of the life of any other person to be inserted in the place of the person happening first to die, would, on demand and on payment or tender of one peppercorn, if demanded, add to the time and term of the lease the life of such person so nominated, which life was to be endorsed on the lease, or to be written in a deed, label, or parchment, to be affixed to the lease for that purpose, or in a separate deed or writing, declaring the life so failing and the life so added in lieu thereof, and the three lives in being, during which the estate should be then continued; and in like manner, from time to time successively thereafter during the term, upon the failure of every other life in the lease then nominated and thereafter to be successively nominated, and upon the like nomination of any other life successively in lieu of every several life so failing, that the lessor, upon like demand, and upon like payment or tender, would successively thereafter add and insert to the time and term of the lease the several life or lives of the several person or persons so successively nominated in the place and stead of the several person or persons so successively happening to die, which several lives so to be added and inserted were to be endorsed with declarations, as in the case of the failing of the first life. An admittedly valid renewal of the lease was made on the 21st December, 1852, for the lives of the Prince Consort, Sir Maziere Brady, and Francis Blackburne. The Prince Consort died on the 14th December, 1861, and there was in existence an unexecuted engrossment of renewal, dated the 16th July, 1864, in which the life of Nicholas Ball was substituted; but at the date of the next *executed* renewal, viz. 20th March, 1872, all the lives in the last previous *executed* renewal, and all the lives in the unexecuted engrossment, had failed. The last-mentioned renewal, which was executed by the tenant for life of the reversion, recited that the lease of the 1st August, 1811, had been several times renewed, and the last two renewals thereof bore date the 21st December, 1852, and the 16th July, 1864 (the unexecuted engrossment), the deaths of the three lives

(1) Before LORD O'BRIEN, L.C.J., and MADDEN and WRIGHT, JJ.

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in the latter instrument, and that the lessee, "in order to supply and fill up the three lives according to the intent and meaning of the said recited indenture of lease of the 1st day of August, 1811, and to preserve and continue the estate in and by the said indenture granted, pursuant to the covenant for renewal therein contained, has nominated the lives of the Right Hon. John, Earl Russell, John Douglas Sutherland, Marquis of Lorne, eldest son of the Duke of Argyll, and His Royal Highness Prince Albert Victor Christian Edward, eldest son of His Royal Highness Albert Edward, Prince of Wales, to be added to the time and term of the recited indenture of lease in the place and stead of" the lives that had failed. Nicholas Ball died on the 15th January, 1865, and there was no direct evidence that a life was nominated upon his death; but after the death of Francis Blackburne, on the 17th September, 1867, a draft renewal was produced, dated 1869, in which the names of the Earl of Derby and Earl Russell were substituted for those of Nicholas Ball and Francis Blackburne. The Earl of Derby died on the 28th October, 1869, and a second draft renewal was produced, in which the Marquis of Lorne was substituted for him. Sir Maziere Brady died before the renewal was executed, and accordingly, when the formal renewal came to be executed on the 20th March, 1872, the lives inserted were those of Earl Russell, the Marquis of Lorne, and Prince Albert Victor; but no reference was made to intermediate nominations. A further renewal, which contained similar recitals, was made on the 30th April, 1879, upon the death of Earl Russell, and it was admitted that its validity could not be questioned if the previous renewal of 1872 was regular. The tenant for life of the reversion, who had been in possession during the period in question, viz., from 1857 to 1891, died on the 22nd July, 1891, and the plaintiffs, who were entitled as tenants in tail, instituted this action of ejectment against the lessees and their under-tenants, contending that, by reason of failure to nominate lives successively, the renewal of 1872 was invalid, and the lease of 1811 at an end. The jury at the trial found as a fact that a new life was nominated from time to time by the lessee for the time being on the fall of each life down to the execution of the renewal of 1879:—

Held, that, upon the true construction of the covenant, it prescribed as necessary for obtaining a renewal that the lessee should regularly nominate a life within a reasonable time from the fall of each life, so as always to maintain the full number of three lives.

Hussey v. *Domvile* (*No.* 2) ([1903] 1 I. R. 265) applied.

Held, also, that a formal renewal was not necessary to preserve the lease, if the nominations had been duly made.

Held, also, that upon production of the renewal of 1872, the onus of proving that the lives had not been regularly nominated lay upon the party alleging it.

Held, also, that the recitals in the renewals of 1872 and 1879, executed by the tenant for life of the reversion, who would have gained materially by the determination of the lease, were declarations upon a subject-matter of which she had special knowledge, and were evidence to support the finding of the jury.

ACTION of ejectment on the title in which the plaintiffs, Herbert Winnington Domvile, Thomas Falls, and Herbert Graves Archer, sought to recover possession of part of the lands of Ballybrack from Amy Louise Callwell, Gertrude Emma Callwell, Mary Alberta Callwell, Helen Lindsay, Mary Callwell, Ida Eleanor Callwell, Anne Dempsey, Sophia Mulligan, Patrick Field, junior, Patrick Field, senior, Anne Smith, George Walpole, Mary Upton, Robert Neville, Mary Brown, and Delia Sophia Jameson.

By lease dated the 1st August, 1811, Sir Compton Domvile granted to Oliver Moore the lands of Ballybrack in the County of Dublin, containing 42 acres 27 perches, plantation measure, to hold the same unto Oliver Moore, his heirs and assigns, for and during the lives and life of Oliver Moore, Jane Moore, his wife, and Henry Revell, and for and during the lives and life of all and every such other persons and person as by virtue of the covenant for renewal should from time to time successively be added during the term in the covenant mentioned, at the yearly rent of £105, payable half-yearly. The covenant for renewal in the lease was in the following terms:—"That upon the death of the aforesaid lives or life of the aforesaid Oliver Moore, Jane Moore, or Henry Revell, or any of them, which shall first happen within the term or time of seventy years to be computed from the 25th day of March last past, upon the nomination of the life of any other person at any time during the said term by the said Oliver Moore, his heirs or assigns, at his or their own request, to be put and inserted in the place and stead of the person so happening first to die as aforesaid, that then he the said Compton Domvile, his heirs and assigns, shall and will at any time thereafter during the said term, on the demand of him, the said Oliver Moore, his heirs and assigns, and upon payment or tender of one peppercorn, if demanded, at the time of such demand, on the fall of every such life add and insert to the time and term of this lease the life of such person so nominated in the place and stead of the person so happening to die as aforesaid; which life so added and inserted is to be endorsed on this lease, or to be written in a deed, label, or parchment to be affixed to this lease for that purpose, or in a separate deed or writing declaring the life so failing and the life so added in lieu thereof and the three lives in being, during which

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the said estate shall be then continued, and in like manner from time to time successively hereafter during the said term of seventy years, commencing as aforesaid upon the failure of every other life in this lease now nominated, and hereafter to be successively nominated as aforesaid, and upon the like nomination of any other life successively in lieu of every several life so failing as aforesaid that then he, the said Compton Domvile, his heirs and assigns, upon the demand of him the said Oliver Moore, his heirs or assigns, upon the like payment or tender made of one peppercorn at the time of such demand, to be made as aforesaid, shall and will successively hereafter during the time aforesaid add and insert to the time and term of this lease the several life or lives of the several person or persons so successively nominated in the place and stead of the several person or persons so successively happening to die as aforesaid, which several lives so to be added and inserted successively are to be endorsed on this lease or written in deeds, labels, or parchments to be affixed hereunto, or in separate deeds or writings declaring the life or lives last failing, and the life or lives so added in lieu thereof, and the three lives in being during which the said estate shall be then to continue as is hereinbefore mentioned."

This lease was in excess of the leasing power vested in Sir Compton Domvile, as tenant for life; but on the 29th March, 1842, Sir Compton Domvile and his eldest son, Compton Charles Domvile, executed a disentailing deed, and a deed of re-settlement of the Domvile estates, whereby they were limited to Sir Compton Domvile for life, with remainder to Compton Charles Domvile in fee-simple, and the leases made by Sir Compton Domvile were corroborated, confirmed, and established. By his will dated 20th February, 1847, Compton Charles Domvile devised the estates to the use of his wife Isabella Maria Domvile (afterwards Isabella Maria Malton) for life, with remainder in default of issue of the testator (which happened), to the use of the first and other sons of Henry Barry Domvile for life, with remainder to their respective sons in tail male. Compton Charles Domvile died on the 19th March, 1852; Sir Compton Domvile died on the 23rd February, 1857; and Isabella Maria Malton (Domvile), who succeeded as tenant for life, died on the 22nd July, 1891, where-

upon the plaintiff, Herbert Winnington Domvile, the eldest son of Henry Barry Domvile, became entitled to the estates as tenant for life.

By a disentailing deed, dated the 9th of December, 1891, to which Herbert Winnington Domvile and his eldest son Compton Charles Domvile were parties, and two indentures exercising a power of appointment created by the deed, the estates were limited to the plaintiffs Thomas Falls and Herbert Graves Archer, for a trust term of 1000 years, and subject thereto to Herbert Winnington Domvile for life, with remainder to his son, Compton Charles Domvile, for life, with remainder to his first and other sons in tail male.

On the 21st December, 1852, Sir Compton Domvile made a renewal of the lease of the 1st August, 1811, to Albert Revell, in whom the lessee's interest was then vested, in pursuance of the covenant for renewal in that lease, for the lives of Prince Albert (late Prince Consort), Maziere Brady (late Irish Chancellor), and Francis Blackburne (late Irish Chancellor), further renewable in accordance with the covenant. The validity of this renewal was admitted by the plaintiffs. Isabella Malton became tenant for life on the 23rd February, 1857, and the first renewal executed by her was dated the 20th March, 1872. In the meantime the Prince Consort had died on the 14th December, 1861, and in 1864 (July 16), there was an engrossment of renewal executed by the lessee, but not by Mrs. Malton, in which the name of the Right Honourable Nicholas Ball was substituted for the Prince Consort. The Right Honourable Nicholas Ball died on the 15th January, 1865, and the Right Honourable Francis Blackburne died on the 17th September, 1867, and there was put in evidence a draft renewal of 1869, which purported to have been submitted with an approval fee to Alma and Hackett, solicitors for Mrs. Malton, in which the names of the Earl of Derby and John, Earl Russell, were substituted. The Earl of Derby died on the 28th October, 1869, and another draft was put in evidence in which the Marquis of Lorne was substituted for him. Sir Maziere Brady died on the 13th April, 1871, and in the formal and duly executed renewal of the 20th March, 1872, to R. S. Law, the names inserted were those of John, Earl

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Russell, the Marquis of Lorne, and Prince Albert Victor Christian Edward. The renewal recited:—"And whereas the said indenture of lease of the 1st day of August, 1811, was several times renewed, and the last two renewals thereof bear dates respectively on or about the 21st day of December, 1852, and the 16th of July, 1864, the latter of which was for the lives of the Right Honourable Maziere Brady, then Lord High Chancellor of Ireland (afterwards the Right Honourable Sir Maziere Brady, Baronet), the Right Honourable Francis Blackburne, then the late Lord High Chancellor of Ireland, and the Right Honourable Nicholas Ball, one of the Justices of Her Majesty's Court of Common Pleas in Ireland. And whereas the said Right Honourable Sir Maziere Brady, Baronet, the Right Honourable Francis Blackburne, and the Right Honourable Nicholas Ball, the three lives in the said last renewal mentioned, have since departed this life. And whereas the said Robert S. Law, in order to supply and fill up the three lives according to the intent and meaning of the said recited indenture of lease of the 1st day of August, 1811, and to preserve and continue the estate in and by the said indenture, granted pursuant to the covenant for renewal therein contained, has nominated the lives of the Right Honourable John, Earl Russell, John Douglas Sutherland, Marquis of Lorne, eldest son of His Grace the Duke of Argyll, and His Royal Highness Prince Albert Victor Christian Edward, eldest son of His Royal Highness Albert Edward Prince of Wales, to be added to the time and term of the recited indenture of lease in the place and stead of the said Right Honourable Sir Maziere Brady, Baronet, the Right Honourable Francis Blackburne, and the Right Honourable Nicholas Ball, so deceased as aforesaid."

After the death of Earl Russell a further renewal was executed by Mrs. Malton, dated 30th April, 1879, in which the life of Thomas Pakenham (now Lord Longford) was substituted for Earl Russell, and which contained recitals in terms identical with those of the renewal of 1872.

The defendants claimed to be in possession under this renewal of the 30th April, 1879, which was admitted to be regular if the renewal of the 20th March, 1872, was regular in the nomination of the lives therein inserted.

The three plaintiffs, having become entitled to the premises under the will of Compton Charles Domvile and the settlement of 9th December, 1891, treated the renewal of 21st December, 1852 (all the lives in which were then dead), as the last valid renewal, and on 16th March, 1904, the plaintiff, Herbert Winnington Domvile, duly served the defendants Amy Louise Callwell, Mary Alberta Callwell, Helen Lindsay, Mary Callwell, and Ida Eleanor Callwell, in whom all the estate and interest of Albert Revell, the lessee in the renewal of 1852, was then vested, with a notice in writing dated the 14th March, 1904, calling on them to quit and deliver up peaceable possession of the premises on the 29th September, then next, or at the end of the year of their tenancy which should expire next after the end of a half-year from the date of the said notice. The other defendants were served as sub-tenants.

The principal defendants, in addition to the plea of possession, pleaded that the plaintiffs and their predecessors in title had always recognized and treated the lease of the 1st August, 1811, and the several renewals thereof as valid and binding, and abstained for a long time from disputing or in any way challenging the same, and stood by while the tenants and their sub-tenants were incurring large expenditure, and entering into obligations in connexion with the premises. In a separate defence it was alleged that when the plaintiff, Herbert Winnington Domvile, became entitled in 1891, there was an agreement between him and the lessees that they should hold the premises as tenants to him during his life upon the terms and subject to the conditions contained in the lease and renewals. The other defendants pleaded possession, and relied on the renewals of 20th March, 1872, and 30th April, 1879, as valid and binding renewals which entitled them to hold possession during the surviving lives in the renewal of 1879.

The case was tried before Andrews, J., and a special jury of the city of Dublin, on the 19th June, 1906, and several following days, when witnesses were examined on behalf of the plaintiffs and defendants.

At the close of the case the learned Judge left the following question to the jury:—"With reference to the lease of the 1st August, 1811, was a new life nominated from time to time by the lessee for the time being on the fall of each life down

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to the execution of the renewal of the 30th April, 1879?" He refused to leave a question as to whether the plaintiff, Herbert Winnington Domvile, stood by and allowed the defendants or any of them to contract or expend money on the premises upon the faith and understanding that the lease and renewals were binding, there not being, in the learned judge's opinion, evidence reasonably sufficient to justify a finding in the affirmative upon it. The jury answered "Yes" to the only question left to them; and the learned judge then, with the assent of both sides, took a verdict in blank from the jury to be filled by the Divisional Court.

Charles O'Connor, K.C. (with him *Ronan*, K.C., *Matheson*, K.C., and *Garrett Walker*, K.C.), for the plaintiffs:—

Covenants for renewal almost identical with the present were construed by the Court of Appeal in *Hussey* v. *Domvile* (*No.* 1) (1), and *Hussey* v. *Domvile* (*No.* 2) (2). In the former of those cases it was held that in the case of such covenants time was of the essence of the contract; that the Tenantry Act did not apply to covenants to renew during a limited period; that there was no equity to relieve the lessee from his own neglect to nominate in time; and that therefore he could not compel the lessor to execute a renewal for a life nominated late. It was also held that the act of the tenant for life did not bind the inheritance, and that the new life was not validly nominated. In *Hussey* v. *Domvile* (*No.* 2) (2) the covenant imposed an obligation on the lessor that he would, upon the dropping of any of the lives which should first happen within a specified term, on the payment of a fine by the lessee, and on the nomination by the lessee of a new life within six months after the death of the person so happening first to die, add such new life in lieu of the person so happening first to die, and that he would in like manner from time to time successively upon the failure of any and every other life in the lease nominated, and thereafter to be successively nominated, on the like nomination and like payment of a fine, successively thereafter and during the same term add the life or lives so successively nominated in the place and stead of each and every of the several persons so successively happening to die as aforesaid. The Court of Appeal held that

(1) [1900] 1 I. R. 417. (2) [1903] 1 I. R. 265.

the lessee should renew regularly within six months from the fall of each life, so as always to maintain (except during such six months) the full number of three lives, and that if he failed so to renew within six months from the dropping of any life he lost his right of renewal. We say that that decision applies with equal force to the covenant in the present case, substituting "a reasonable time" for six months. A life must be nominated within a reasonable time from the dropping of each life, and unless this is done the right of renewal under the covenant is gone. The three candles must be kept continually burning. We treat the renewal of 1852 as a valid renewal. Mrs. Malton became the person to execute renewals in 1857, but there was no renewal between 1852 and 1872. The Prince Consort died in 1861, Ball in 1865, Blackburne in 1867, and Brady on the 13th April, 1871, so that, when the renewal of 1872 came to be made, all the lives in the last valid renewal of 1852 were dead. When a reasonable time had elapsed after the death of the Prince Consort, the three candles ceased to be burning at the same time, and the right of renewal was gone. When Mrs. Malton purported to execute a renewal on the 20th March, 1872, the power to renew so as to bind the inheritance was gone, and the only effect of her act was to bind her own life estate. The renewal of 1872 thus falls to the ground, and the renewal of 1879 falls with it. The doctrine of *omnia praesumuntur rite fuisse acta* has no application to the present case. It will be presumed that a public officer has done his duty, but it will not be presumed that the lessees nominated lives under this covenant at the proper times, because there was no obligation on the lessees to renew. The defendants put in evidence an engrossment of renewal dated the 16th July, 1864, which had been prepared for execution by Mrs. Malton, but which was, in fact, never executed by her. It purported to substitute the life of Ball for that of the Prince Consort, who had died in 1861; and if it had been executed by Mrs. Malton, it would have been a valid renewal. It was executed only by the lessees; but in any event all the lives mentioned in it were dead in 1872. At the time of the preparation of the draft renewal of 1869, which was put in evidence, both Ball and Blackburne were dead, and no life had been added to keep the three candles burning. It purported to nominate the lives of the Earl of Derby and Earl

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Russell instead of those of Ball and Blackburne. The Earl of Derby died on the 23rd October, 1869; and when the draft renewal of 1871 (also put in evidence) came to be prepared, it contained no reference to the nomination of the Earl of Derby in the draft renewal of 1869. So that that nomination is ignored and treated as invalid in the later document. There is a pencil endorsement in the draft renewal of 1871—"All the lives have dropped."

Under these circumstances there was no evidence to sustain the finding of the jury that a new life was nominated from time to time by the lessee for the time being on the fall of each life down to the execution of the renewal of the 30th of April, 1879; and the learned judge at the trial should have so directed. [He referred on this branch of the case to *Rubery* v. *Jervoise* (1) and to *Bayley* v. *Corporation of Leominster* (2).]

Upon the death of Mrs. Malton on the 22nd July, 1891, the principal defendants became tenants from year to year at the rent reserved in the lease to the plaintiffs. The notice to quit was served on the 15th March, 1904, and we say on its terms it either expired on the 25th March, 1905, which was the date from which the rent under the lease of 1811 commenced to run, or on the 30th April, 1905, which would be the end of a year of the tenancy, treating the tenancy to have commenced on the 30th April, 1879, the date of the last renewal by Mrs. Malton, which we treat as an original lease from her binding only on her own life estate: see Foa's Landlord and Tenant, p. 557.

Jellett, K.C. (with him *The Right Hon. J. H. Campbell, K.C.*, and *Chaytor, K.C.*), for the principal defendants:—

This is an action of ejectment on the title, and the onus is on the plaintiffs of proving that the covenants and conditions contained in the lease of 1811 were not performed. After the dealings which took place, and the acceptance of rent, the burden of proving regularity and validity of nomination must not be thrown on the tenant: see judgment of Fitz Gibbon, L.J., in *Hussey* v. *Domvile* (No. 2) (3). The main question in the case is—Was there evidence to go to the jury to sustain the finding at which they arrived? The period called in question is the period from 1864 to

(1) 1 T. R. 229. (2) 3 Br. Ch. Cas. 529. (3) [1903] 1 I. R. at p. 274.

1872—eight years; and if every condition and covenant in the lease were regularly and validly performed during half a century, surely the jury, in the absence of evidence to the contrary, were justified in finding that they were regularly and validly performed during the eight years: see judgment of Lord Westbury in *Lee* v. *Johnstone*(1); see also *Doe* d. *Brune* v. *Rawlings* (2); *Tennent* v. *Neil* (3); *O'Kane* v. *O'Kane* (4); and *Gibson* v. *Doeg* (5). The case for the plaintiffs depends upon the confusion of nomination with renewal. If the nomination of a new life within a reasonable time was essential upon the dropping of a life in the lease, it was not necessary that that should be followed by a formal renewal. The nomination of a new life could be effected by letter, or by the lessee walking into the lessors' office, and verbally naming a new life in the place of one who had died. The execution of a renewal was something to be done afterwards. The history of the case shows that nominations made from time to time were not followed by renewals. The engrossment of 1864 shows that upon the death of the Prince Consort, who was the first life in the admitted renewal of 1852 to fail, the life of Ball was nominated instead. The jury were justified in inferring that upon the death of Ball in 1865, and upon the death of Blackburne in 1867, the same course was adopted; and the fact that the names of the Earl of Derby and Earl Russell appear for the first time in a draft renewal of 1869 is by no means conclusive that their lives were nominated for the first time at that date. The Earl of Derby died on the 28th October, 1869, and forthwith the draft of 1869 is discarded, and a new life, that of the Marquis of Lorne, is nominated in his stead, as appears by the draft renewal of the 26th March, 1871. Brady died on the 13th April, 1871, before the latter draft was executed; and when the formal renewal came to be executed on the 20th March, 1872, we likewise find that his name disappears, and the name of Prince Albert Victor is added in his stead. Thus we account for the three lives in the renewal of 1872, viz., Earl Russell, the Marquis of Lorne, and Prince Albert Victor, not as nominated for the first time in substitution for the three lives in the renewal of 1852, but as following in

(1) L. R. 1 Sc. & Div. App. 435. (2) 7 East, 279. (3) I. R. 5 C. L. 418.
(4) 30 L. R. Ir. 489. (5) 2 H. & N. 615.

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regular succession upon nominations validly and properly made, as each of the original three lives and the intermediate lives successively dropped. The doctrine of *omnia praesumuntur rite fuisse acta* applies in this case. It does not make any difference, in the application of the doctrine, that there was no obligation to nominate. The renewals were executed in conformity with the covenant; and there is a presumption that they were properly executed upon nominations validly made from time to time. The presumption arises when a title has been shown by the party who relies on the presumption, good in substance, but wanting some collateral matter necessary to make it complete in point of form: see judgment of Tindal, C.J., in *Doe* d. *Hammond* v. *Cooke*. (1).

Mrs. Malton was the person in whom was vested the power of binding the inheritance by granting renewals under the lease of 1811. She was tenant for life of a settled estate, and she represented the estate for the purpose of making an acknowledgment: see the judgment of Sir Edward Sullivan in *Becher* v. *Delacour* (2), and judgment of Chatterton, V.-C., in *Kirwan* v. *Kennedy* (3). The recitals in the renewals of 1872 and 1879, that the lease of 1811 was several times renewed, and that the filling up of the lives was according to the intent and meaning of the lease of 1811, and to preserve and continue the estate in and by the said indenture granted, pursuant to the covenant for renewal therein contained, constituted a declaration by Mrs. Malton against interest, and was a declaration upon which the jury were entitled to act upon the issue of fact before them. It would have been her interest to assert that the nomination was invalid and irregular, as a right would then have accrued to her to demand an increased rent—an advantage which was valued at £2000 a year. Once a statement is made against interest, it is a statement that avails against everybody: *Higham* v. *Ridgway* (4); see judgment of Le Blanc, J., at pp. 335-6.

All the foregoing argument has proceeded upon the assumption that the plaintiffs' construction of the covenant is right. It is not similar to the covenant in *Hussey* v. *Domvile* (No. 2) (5),

(1) 6 Bing. at p. 179.
(2) 11 L. R. Ir. at p. 196.
(3) I. R. 11 Eq. at p. 502.
(4) 2 Sm. L. C. 327.
(5) [1903] 1 I. R. 265.

where there was a limitation in point of time. We say that in the absence of a limitation in point of time, the true construction of this covenant is either—(1) that the three lives may be nominated at any time within the term; or (2) that a nomination may be made within a reasonable time after the dropping of each life. Should the latter construction be adopted, we say that the verdict of the jury involves a finding that the lives were nominated within a reasonable time.

The notice to quit is bad. The yearly tenancy, if such be held to exist, commenced on the 1st August, because Mrs. Malton is estopped from saying that she did not renew under the lease of 1811: *Young* v. *Raincock* (1); Woodfalls' Landlord and Tenant (last edition), p. 246.

Gordon, K.C. (with him *Healy, K.C.*, and *Leech*), for other defendants.

Matheson, K.C., in reply:—

The effect of the defendant producing the renewal of 1872 is at once to show that the right of renewal under the lease of 1811 is gone. All the lives in the last valid renewal were then dead—the three candles had gone out; and unless you can show that as each candle went out a new one was put in its place, the right of renewal was gone. If the lives had been nominated successively, and as each life failed, it would have been so recited in the renewal of 1872. The expression, "to be added," means added for the first time. The meaning to be derived from the recital was a question of construction for the Judge, who, in order to enable the defendants to succeed, should have ruled as a point of construction that it meant that the lives had been successively nominated. The covenant in *Hussey* v. *Domvile* (*No.* 1) (2) was identical with that in this case; and it was there held that the tenant for life could not re-impose a burden on the inheritance when it was once gone: see judgment of Walker, L.J., at pp. 448 and 451. A declaration against interest could have no binding effect, save as against Mrs. Malton's life estate. When the

(1) 7 C. B. 310, at p. 338. (2) [1900] 1 I. R. 417.

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plaintiffs show that the defendants hold under a lease that has expired, the onus is on the defendants of showing a valid renewal, and that onus is never shifted. It is absurd to say that Mrs. Malton meant by the recital that the covenant had been performed according to the interpretation put upon it long afterwards by the Court of Appeal.

[Upon the notice to quit point he referred to *Sandell* v. *Franklin* (1).]

Cur. adv. vult.

1907. Feb. 18.

LORD O'BRIEN, L.C.J. :—

This case is of considerable importance, involving the right to possession of a considerable portion of Ballybrack. Colonel Domvile, the plaintiff, asserts that in the events which he alleges have happened he is entitled to recover possession of the lands and premises in question ; and he has brought an ejectment with that object. The jury who tried the case found the only question submitted to them in favour of the defendants; and the question presented for determination is whether they were justified in so finding, whether there was evidence which justified them in so doing. The case was tried by my brother Andrews, and all the facts and documents are set forth in his most admirably lucid report—a report which I feel would be only marred by any mere repetition of its contents. I ventured during the discussion of the case to say that, notwithstanding the detailed treatment which the case was receiving at the hands of counsel, its determination would be practically found to hinge on the character and effect of the indenture of renewal of the 20th March, 1872—that this deed was, so to speak, the central position from which we were to survey the entire controversy, looking at that central position itself, and looking from it upwards to the original lease of 1811, or downwards to the last renewal of the 30th April, 1879. Indeed in my upward survey I need not go higher than the deed of 1852, because the battle-ground of the parties lies in the interval between that deed and the deed of 1872.

The opinion I expressed during the argument I still retain. Without venturing to resort to all the details of the case, I would

(1) L. R. 10 C. P. 377.

wish to point out, in a few sentences, how the deed of renewal to which I have referred becomes, in my opinion, I will not say the determining factor in the case, but a very important factor in its determination, especially bearing in mind that the battle-ground of the parties lies prior to that deed. The statement of claim distinctly makes the case in its 10th and 11th paragraphs, that it was on the death of Sir Maziere Brady, on the 13th April, 1871, that all right to renewal was lost: that from that period there was no valid renewal. But let me go back to the origin of the title. So far back as the 1st August, 1811, Sir Compton Domvile, the then owner in fee, made a lease of the lands in question to Oliver Moore to hold for certain lives therein mentioned; and this lease contained a covenant for renewal, as to the true construction of which, and the due compliance with the exigencies of which, from time to time, the present controversy arises. It has been read so often that it is not necessary to read it again. We are unanimously of opinion that it is not materially different, so far as relates to the question before us, from the covenant of renewal referred to in the case of *Hussey* v. *Domvile (No. 2)* (1), and that we must give it the construction the Court of Appeal attached to the covenant in that case. We are of course bound by the decision of the Court of Appeal in that case. Now, the Court of Appeal unanimously decided in an elaborate judgment that the covenant referred to in that case should be construed to mean that the nomination of lives, as distinct from the execution of instruments of renewal, should be made from time to time as the various lives mentioned in the instruments of renewal dropped—that is to say, that there should be a fresh nomination as each life theretofore nominated dropped, that as the lives successively dropped, lives should be successively nominated; that it would not suffice to nominate simultaneously two lives, if there was any substantial interval of time between the dropping of the lives; that the candles, so to speak, should burn simultaneously.

The jury have found in the case that the lives were nominated as they dropped. The precise question put them by my brother Andrews was, "With reference to the lease of the 1st August, 1811, was a new life nominated from time to time by the lessee for the

(1) [1903] 1 I. R. 265.

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time being on the fall of each life, down to the execution of the renewal of the 30th April, 1879?" The jury answered this question in the affirmative. Was the jury justified in so finding? Was there evidence in the case proper to be submitted to the jury to warrant this finding? This is the question we have to determine. In my opinion there was such evidence. I turn to the indenture of renewal, of the 20th March, 1872. It cannot be pretended, if things were rightly done up to that renewal, that there was any irregularity subsequent to that renewal. Was there any irregularity before it? Were the lives nominated in due course before that renewal? Was there any miscarriage before that renewal? I am of opinion that the onus of proof to show this lies on the plaintiffs, and that they have not discharged it. Even if the onus which originally lay on the plaintiff was discharged by showing the last life in the lease of 1852 dropped, it shifted back again to the plaintiffs on proof of the execution of the renewal of 1872, and of possession under it. This indenture of 1872 was duly executed by the tenant for life of the fee, and all the appropriate parties. It was formally complete. It was made in 1872, over thirty years ago. It was acted upon, rent was paid under it from time to time, and another instrument of renewal, namely the deed of 1879, was made upon the basis that it was a valid deed. It was dealt with as a binding instrument regularly made. It was, moreover, much against the pecuniary, the proprietary, interest of the tenant for life to make that deed, for if there was no obligation to make it, the pecuniary, the proprietary, interest of the tenant for life would be immediately enhanced to something over £2000 a year. To make it at all imposed a burden on the estate; and to make it under the circumstances deprived the tenant for life of what would have been a much larger rent than the one originally reserved. The then letting value of the lands was concededly much higher than the original rent.

The onus of proof then resting on the plaintiffs—have the plaintiffs discharged it? I think not. The deed itself, the deed of 1872, purports to renew pursuant to the covenant for renewal in the deed of 1811, that is to say, it purports to give effect to nominations properly made, to nominations successively made as each life dropped.

What is there to countervail this? I can find nothing. There is no proof in the case that I can see, nor any document which shows, that those lives were not nominated in due succession. There is nothing to countervail the principle *omnia praesumuntur rite esse acta.* And with reference to this principle I may, whilst I look up and down the case, and survey the whole field of litigation from 1811 to the last renewal, and see the enjoyment of premises which has obtained for such a length of time, quote a well-known passage in Lord Westbury's judgment in the case of *Lee* v. *Johnstone* (1). He says at page 435:—"Now, I know no greater obligation that lies upon a Court of Justice than that of supporting long-continued enjoyment by every legal means, and by every reasonable presumption. And I dwell more particularly upon this obligation to presume everything that can be reasonably supposed to have existed in favour of long possession, because I do not find that principle quite so prominent as I could have desired in the judgments of the Courts below, which, when they refer to this head of judicial decision, rather run off into the conclusion that the action is barred by negative prescription. The difference is very great. Negative prescription proceeds upon the foundation of the illegality and the imperfect obligation created by the thing that is challenged; but the doctrine of presumption goes on the footing of validity, and upholds validity by supposing that everything was present which that validity required. The great principle, *Omnia praesumuntur rite fuisse acta*, is the principle that ought to be observed, and not the ground that the thing itself was challengeable, but that the challenge is cut off by prescription." This is the well-known passage in the judgment of that great lawyer, Lord Westbury, and I venture to paraphrase one sentence in it. He says that the doctrine of presumption goes on the footing of validity, and upholds validity, by supposing that everything was present that that validity required. I think I may read that sentence in this way: "The doctrine of presumption upholds validity by supposing that lives were nominated from time to time, as validity required." Of course, I know that the case of *Lee* v. *Johnstone* (1) was conversant with a longer lapse of time, and that the enjoyment there was referable to a single instru-

(1) L. R. 1 Sc. & D. App. 426.

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ment—if I may so describe it, one *quasi* judicial decree, but still I think the principle to which Lord Westbury refers is applicable to this case. I think, having regard to the execution of the renewal of 1872, and to the character of that instrument, and to the facts in relation to it, and to the long enjoyment that has taken place, a disputable presumption arose that it was a valid instrument, and that nothing appears to the contrary. If the deed of 1872 was right, the deed of 1879 cannot be questioned. It must be remembered that the deed of 1852 is not impeached, but the central fact is the existence of the deed of 1872. This view would, in my opinion, justify us in entering a verdict for the defendants; but I am anxious to present the case from a different standpoint, namely, whether there was evidence in the case, affirmative evidence, to support the verdict of the jury. The consideration of this question may lead to a repetition of the facts connected with what I have been hitherto dealing with, viz., the *onus* of proof, but I wish to treat these matters distinctively.

Was there then affirmative evidence? I think the recital in the deed of 1872, which has been so often referred to, is evidence, as distinguished from estoppel, proper to be submitted to the jury, that the nomination of lives was made in due succession. What is that recital? I have already referred to the important words:—"pursuant to the covenant for renewal," but perhaps I should read the recitals which are in immediate conjunction. They are as follows:—"And whereas the said indenture of lease of the 1st day of August, 1811, was several times renewed, and the last two renewals thereof bear dates respectively on or about the 21st day of December, 1852, and the 16th of July, 1864, the latter of which was for the lives of the Right Honourable Maziere Brady, then Lord High Chancellor of Ireland (afterwards the Right Honourable Sir Maziere Brady, Baronet), the Right Honourable Francis Blackburne, then the late Lord High Chancellor of Ireland, and the Right Honourable Nicholas Ball, one of the Justices of Her Majesty's Court of Common Pleas in Ireland; and whereas the said Right Honourable Sir Maziere Brady, Baronet, the Right Honourable Francis Blackburne, and the Right Honourable Nicholas Ball, the three lives in the said last renewal mentioned, have since departed this life."

And now I come to the recital which was so much canvassed: "And whereas the said Robert S. Law, in order to supply and fill up the three lives according to the intent and meaning of the said recited indenture of lease of the 1st day of August, 1811, and to preserve and continue the estate in and by the said indenture granted pursuant to the covenant for renewal therein contained has nominated the lives of the Right Honourable John, Earl Russell, John Douglas Sutherland, Marquis of Lorne, eldest son of His Grace the Duke of Argyll, and His Royal Highness Prince Albert Victor Christian Edward, eldest son of His Royal Highness Albert Edward, Prince of Wales, to be added to the time and term of the said recited indenture of lease in the place and stead of the said Right Honourable Sir Maziere Brady, Baronet, the Right Honourable Francis Blackburne, and the Right Honourable Nicholas Ball, so deceased as aforesaid."

This is the important recital. Now, the lives of Blackburne, Brady, and Ball having dropped, the three candles, so to speak, being out and having gone out at different periods, does the language of the recital imply that there was a simultaneous nomination of substituted lives, or does it imply that there was a successive nomination from time to time of a life according as each life dropped? This was the great controversy in the case. I think that the recital should be read in the light of the covenant for renewal in the lease of 1811, and we are told by the Court of Appeal that the true construction of the exigency of that covenant for renewal is, that a new life should be named as each life successively dropped. This being so, I think the expression "pursuant to the covenant of renewal therein contained has nominated the lives" therein mentioned, means not that the names were nominated *uno flatu*, but were nominated according to the exigency of the covenant in due succession as each life dropped. I think too that the principle *res magis valeat quam pereat* applies, and that we should give the recital a construction which would uphold rather than defeat the deed. This being so, the statement in the recital having been made by the tenant for life, who had an appropriate leasing power, who was in the present management of the estate, was, in my opinion, evidence proper to be submitted to the jury. If the lives in the indenture were duly nominated, all

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the antecedent lives must have been duly nominated, because if there was one wrong nomination, no succeeding nomination could be right. If the chain, so to speak, of nomination once got broken, it could never be rightly repaired.

I think that all—if not all, nearly all—the grounds upon which the paper or letter referred to in the case of *Doe* d. *Brune* v. *Rawlings* (1) was admitted in evidence, are applicable here. What was that case? The marginal note states what it was:—"Where A, tenant for life, with a limited power of leasing, reserving the ancient rent, received a letter from a confidential agent, in 1728, containing a minute account of the tenants and rent of the estate, which letter the tenant for life endorsed 'A particular of my estate, &c.,' and handed down to B, the succeeding tenant for life, who had a like limited power of leasing, by whom it was also preserved and handed down amongst the muniments of the estate to the first tenant in tail: *held*, that such paper was evidence for the tenant in tail against a lessee of B, in order to show that the rent reserved by B, the tenant for life, was less than the *ancient* rent which was reserved at the time to which such paper referred; the paper having been accredited by the then owner of the estate, who had the means of knowing the fact, and who had an interest the other way, viz., to diminish the rent in order to increase his fine upon renewal under the power; and *held* also, that the entries by A, the tenant for life, in his book of the receipt of the rent to the amount stated, were also evidence of the same fact."

This is a concise and correct statement of the facts of the case and of the ruling made.

Now, let us see what Lord Ellenborough, who delivered the unanimous judgment of the Court, said, and let us see whether the principles he lays down are not applicable to the present case. He says:—"The contents of the paper were adverse to the title of the person who had possession of it; it diminished his interest in the fine on renewal, in the same proportion as it raised the rent to be reserved. The paper was written by a confidential agent at least, though it does not appear that he was the immediate steward of the estate at the time, but certainly, as the contents show, by

(1) 7 East, 279.

one who had intimate knowledge of it; and it was in some degree recognized as authentic by the then owner of the estate, the tenant for life, by this endorsement written on it, 'From Hobart, a particular of my estate in Cornwall,' thereby importing that the writer bore the degree of relation to the estates and their owner which he purports to do on the face of the paper, and that the owner considered the paper as an actual particular of his estates. The question then is, whether this declaration of the tenant for life so circumstanced (for it is to be considered only as a declaration by him) as to the existing rent of the tenement in question, be evidence of that fact against the succeeding tenant for life of the estate having a similar limited power of leasing, reserving the ancient rent, who claimed as a purchaser; for if he had derived title from the former tenant for life by whom the endorsement was made, the case would have been quite clear. And we think it is also evidence against the defendant who claims from a succeeding tenant for life. It appears that the former tenant for life, by whom the paper was thus accredited, was not only disinterested in respect of this particular fact of the then existing rent, but that he had an interest the other way, to diminish the amount of it."

Here too the person who makes the declaration had an interest the other way. Lord Ellenborough continues:—"Then at this distance of time, with the means of knowledge which he had of the fact, and his interest in declaring it the other way, we think that his declaration is evidence of the fact to go to the jury."

So I say here of this recital. Looking at the whole case; looking at what I described as the central position, the renewal of 1872, the execution of that deed itself, and its execution with the recital I have referred to in it—the deed and its recitals; looking at the payment of rent under it; looking at the deed of 1879, its execution and the payment of rent under it; bearing in mind that the deed of 1852 has not been impeached; looking up and down the long line of possession, I am of opinion there was evidence, affirmative evidence, in sustainment of the answer the jury gave to the question submitted to them by my brother Andrews.

On the whole case I am of opinion that a verdict should be

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entered for the defendants on two grounds—1st, that the onus of proof lay upon the plaintiffs, and that they did not discharge it; 2nd, that there was affirmative evidence in the case to sustain the finding of the jury.

MADDEN, J.:—

The lands sought to be recovered in this action were demised on the 1st August, 1811, by Compton Domvile to Oliver Moore for three lives, all of whom are now deceased, with a covenant for renewal (which I shall have to consider in detail) during the term of seventy years, at the rent of £105, and the nominal fine of a peppercorn, if demanded. This lease was in exercise of a leasing power vested in Compton Domvile, who was tenant for life; but no question arises as to its validity as affecting the inheritance of the lands, for on the 29th March, 1842, a disentailing assurance was executed by Compton Domvile (then Sir Compton Domvile), and his eldest son, Compton Charles Domvile, by which the lease in question, together with some others, was validated.

The title of the plaintiff, as tenant for life of the reversion, expectant on the determination of the lease of 1811, is not in dispute. But it is important to note its devolution, in relation to the question for our decision. Compton Charles Domvile, who became tenant in fee-simple under the disentailing deed of 1842, devised the lands to trustees to the use of Isabella Maria Domvile (afterwards Isabella Maria Malton) for her life, with remainder (in the event which happened) to the use of the sons of Henry Barry Domvile, successively, for life, with remainder over. Compton Charles Domvile (the elder) died on the 19th March, 1852; Sir Compton Domvile died on the 23rd November, 1857; Isabella Maria Malton died on the 22nd November, 1891. The plaintiff, Herbert Winnington Domvile, thereupon became beneficially entitled, as tenant for life in possession, to the reversion expectant on the lease of 1811, the title to which is now governed by a disentailing deed and deeds of settlement executed by him and by his eldest son with the provisions of which we are not concerned. The inheritance of the lands, subject to the lease of 1811, was from time to time represented as follows: from the date of the lease until 23rd February 1857, Sir Compton Domvile was

tenant for life. Between that date and 22nd July, 1891, Mrs. Malton held the same estate. She was succeeded by the plaintiff as tenant for life. Thus it appears that there was at no time during the currency of the lease any person representing the estate of the lessor who was empowered to increase the burden on the inheritance created by the provisions of the lease.

What those provisions are, I now proceed to inquire; and in this part of the case we have the guidance of the decision of the Court of Appeal in the second case of *Hussey* v. *Domvile* (1). The covenant for renewal is faithfully set forth in the second paragraph of the statement of claim. This covenant is not expressed with perfect accuracy, but its purport is sufficiently clear. It divides itself into two parts, the former conversant with the earliest dropping of a life. In this event an obligation to renew arises "upon the nomination of the life of any other person at any time during the said term by the said Oliver Moore, his heirs or assigns, at his or their own request, to be put and inserted in the place and stead of the person so happening first to die as aforesaid"; and this obligation is enforceable "at any time thereafter during the said term" upon demand, and upon payment of a peppercorn if demanded. The life of the person so nominated is to be substituted for the person so happening to die, "which life so added and inserted is to be endorsed on this lease, or to be written in a deed, label, or parchment to be affixed to this lease for that purpose, or in a separate deed or writing declaring the life so failing, and the life so added in lieu thereof, and the three lives in being during which the said estate shall be then to continue."

This is the portion of the covenant conversant with the filling of the place of whatever life should be the first to drop. The deed then provides for what is to be done "in like manner from time to time successively hereafter during the said term of seventy years, commencing as aforesaid, upon the failure of every other life in this lease now nominated or hereafter to be successively nominated as aforesaid." The lessor covenants that on the nomination of a life in the place of each life so failing he will, on demand of the lessee and upon payment of a peppercorn (if demanded),

(1) [1903] 1 I. R. 265.

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successively substitute the life or lives of the persons so nominated for the lives of the persons successively dying, "which several lives so to be added and inserted successively are to be endorsed on this lease, or written in deeds, labels, or parchments to be affixed hereunto, or in separate deeds or writings, declaring the life or lives last failing and the life or lives so added in lieu thereof and the three lives in being during which the said estate shall be then to continue as is hereinbefore mentioned."

I have quoted the concluding words *in extenso*, for they are, in my opinion, of great importance in regard to the construction of this covenant. I am clearly of opinion that the lessee, in order to keep alive his right to future renewals, must nominate a new life on the dropping of each life, successively, so as to keep up by successive nominations the full number of three lives. The decision of the Court of Appeal in *Hussey* v. *Domvile* (*No.* 2) (1) is decisive on this point. There are no doubt variances between the covenant which was the subject of decision in that case, and the covenant in the lease before us. In the present lease, no specific time having been limited within which the nomination is to be made, the lessee is entitled to exercise his right within a reasonable time after the dropping of each life. There is in the lease before us no pecuniary fine: a circumstance which will be found to be of importance in another branch of the case. The existence of such a fine was one of the elements which influenced the judgment of the Court of Appeal in *Hussey* v. *Domvile* (*No.* 2) (1). But that the decision on this point would have been the same if the fine had been a nominal one, is apparent from the judgments of all the members of the Court. Lord Justice Holmes says (p. 281):—"I prefer, however, to decide the case upon the terms of the covenant for renewal, which seem to me to require that there should be three lives of the lease in being at the end of six months after the death of each life." Substituting "a reasonable time" for "six months," these words are applicable to the present case.

Upon the nomination of each life, in accordance with the covenant, the lessee acquires a right to have the new life added to the lease, and inserted in place of the life which had dropped.

(1) [1903] 1 I. R. 265.

No form is prescribed for the nomination. It would ordinarily be by notice or letter; but I see no reason why it should not be by parol. The nomination necessarily precedes the adding and inserting of the new life, and it is the foundation of the exercise of the right to a renewal. The covenant prescribes several modes in which this adding and inserting may be effected. The existing lease may have added to it an endorsement, or affixed to it a deed, label, or parchment on which the name of the new life is written, or there may be a renewal of a more formal character. In the case of the first life, this renewal will be necessarily conversant with the nomination of a single life, and the instrument will declare the lives for which the lease is to continue, who will be the two surviving lives and the substituted life. Where more lives than one life have dropped, the provisions of the covenant as to a deed of renewal are different. The lives must be successively nominated; but the execution of a formal renewal may be postponed until the dropping of more than one life. The separate deed is to declare "the life or lives last failing, and the life or *lives* so added in lieu thereof, and the three lives in being" during which the lease is to endure. The trouble and expense of a renewal need not be incurred on the dropping of each life. The regular course prescribed would be endorsement or notification of each life, as added in succession. But the provisions as to endorsement or notification are not mandatory, and provided always that the lives are successively nominated, there seems to be no objection to the subsequent execution of a separate deed or renewal, extending the term for the lives, original or substituted, in existence at the date of its execution. The successive nomination of the substituted lives is a matter of fact, the proof of which is to be established according to the laws of evidence, from which it follows that the first question to be considered is upon which of the parties to this action the burden of proof rests.

The plaintiff, Major Domvile, was the defendant in the cases of *Hussey* v. *Domvile* (1). He was in each of those cases resisting a claim for specific performance of the covenant for renewal; and in each case the plaintiff who invoked the active intervention of a

(1) [1900] 1 I. R. 417; [1903] 1 I. R. 265.

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Court of Equity was bound to prove the continued subsistence of the equitable right upon which he relied. Here he is plaintiff in an action of ejectment on the title, brought for the recovery of land of which the defendants are in possession; and the law casts upon him the burden of establishing, by the strength of his own title, a right to the possession of the land. Accordingly, in his statement of claim, he sets forth the lease of 1811. He refers to, and does not question, the validity of several renewals of the lease executed by Sir Compton Domvile, then tenant for life, in the interval between that date and the year 1852, when the lessee's interest had become vested in one Albert Revell. He sets forth a deed which he admits to be an indenture of renewal, dated the 21st of December, 1852, executed by Sir Compton Domvile to Revell for three lives, of whom the last survivor died on the 13th of April, 1871. He admits the subsequent creation of a yearly tenancy created by receipt of rent, and relies on a notice to quit terminating that tenancy, and entitling him to possession on the 29th of September, 1905.

I do not discuss the question that has been raised as to the sufficiency of the notice to quit. Assuming its validity, the case thus made by the plaintiff has the effect of shifting the burden of proof. It rests on the defendants to establish either a legal continuation of the lease of 1811, by successive nomination of lives in accordance with the covenant, or the existence of some equity disentitling the plaintiff to rely on his legal title. The case of *Hussey* v. *Domvile* (*No.* 1) (1) disposes of any defence based on a general equity, either under the Tenantry Act, or founded on the principle under which Courts of Equity relieve in case of forfeiture. It follows that the defendants, in answer to the plaintiff's *prima facie* case, are bound to give evidence justifying a finding in favour of the legal continuation of the lease of 1811.

In support of this case they give in evidence an indenture dated the 30th April, 1879, executed to the persons in whom the lessee's interest was thus vested, by Isabella Maria Malton, the then tenant for life of the reversion. This deed having recited the lease, continues thus:—"Whereas the said indenture of lease

(1) [1900] 1 I. R. 417, 428.

of the 1st of August, 1811, was several times renewed, and the last two renewals thereof bear dates respectively on or about the 16th day of July, 1864, and the 20th day of March, 1872, the latter of which was for the lives" therein mentioned, that is to say, John, Earl Russell, the Marquis of Lorne (now Duke of Argyll), and Prince Albert Victor. It recited the death of Earl Russell and the title of the respective parties, and that the lessees, "in order to supply and fill up the life of the said John, Earl Russell, according to the intent and meaning of the said recited indenture of lease of the 1st day of August, 1811, and to preserve and continue the estate in and by the said indenture granted pursuant to the covenant for renewal therein contained," had nominated the life of Thomas Pakenham, in place of Earl Russell. Then follows a formal renewal of the lease of 1811, executed by Mrs. Malton. If the covenant for renewal was in force when that renewal was executed, it constitutes a complete answer to the plaintiff's claim, and entitles the defendants to retain possession of the lands for the lives then nominated and now in existence, and the life of the survivor. But if the right to renewal had been lost owing to the neglect of the lessees to keep three lives in continual existence, by successive nomination, then no act done by the tenant for life could confer any right as against the plaintiff as remainderman.

On whom then does the burden of proof now rest? In my opinion the production and proof of a renewal, valid on the face of it, executed by a preceding tenant for life, in apparent discharge of an obligation affecting the inheritance of settled land, affords protection to the lessees against an action of ejectment at the suit of a remainderman, unless and until the plaintiff establishes the invalidity of the renewal by affirmative proof. There are other elements in the present case which I shall presently consider; but, in my opinion, the burden of proof was shifted on proof of the renewal of 1879, which satisfies the conditions which I have mentioned. The proposition which I have stated appears to me to follow from a recognition of the position of the tenant for life of a settled estate, as representing the inheritance for the purpose of discharging an obligation with which it is onerated.

The position of a tenant for life of an estate so circumstanced

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differs from that of the donee of a power, who may or may not exercise it. "The obligations to renew by virtue of the covenant attach upon the estate of the tenant for life as the burden of the covenant runs with the land, and to that extent he is competent and bound to keep up the liability of the inheritance; but I cannot attribute to him a dominion exceeding his liability. The granting of a renewal by a tenant for life is not the exercise of a power, but a carrying out of his representation of the inheritance for the purpose of discharging its obligations": *per* Walker, L.J., in *Hussey* v. *Domvile* (*No.* 1) (1).

I find a clear statement of the representative character of the tenant for life of a settled estate in the judgment of Smith, M.R., in *In re Fitzmaurice, Minors* (2), one of a class of cases the analogy of which to that with which we have to deal, is recognized in the judgment of Walker, L.J., from which I have quoted. Having referred to *Maunsell* v. *Russell* (3) as an authority for the proposition that a tenant for life has "not a limited estate in the entire interest, but the entire interest for a limited time," he adds: "Now, if a tenant for life under a settlement such as the settlement in the present case represents during his life estate the entire interest for a limited time, there is ground for saying that a payment or acknowledgment during the life estate would bind a remainderman claiming under the same settlement." It is, in my opinion, a necessary consequence of the representative character of a tenant for life, in regard to the discharge of obligations affecting the inheritance, that an act lawfully done by him in discharge of such an obligation is binding on a remainderman; and it seems also to follow with equal certainty, from an application of the ordinary principles of our law, that when the invalidity or illegality of an act purporting to be so done is alleged, the burden of proving the allegation rests on the party by whom it is made. The application of this general principle to a case similar to the present was regarded by the Court of King's Bench in England as so manifest that a contrary position was abandoned in argument.

The case of *Doe* d. *Brune* v. *Rawlings* (4) was an action of ejectment on the title brought by a remainderman against a

(1) [1900] 1 I. R. at p. 451.
(2) 15 Ir. Ch. R. 445.
(3) 2 Ir. L. R. 205, note.
(4) 7 East, 279.

person in possession under a lease granted by a former tenant for life under a leasing power. The lease appears to have been regular so far as regards form, but its validity was disputed on the ground that it did not conform with this leasing power, inasmuch as it did not reserve the ancient yearly rent or a proportionate part thereof, as required by the power. The plaintiff was non-suited, and an attempt was made in the argument in the King's Bench, upon a rule to set aside the non-suit, to show that the *onus probandi* lay on the defendant to prove that the rent reserved was the ancient rent, in order to establish that the lease was within the power. This position was found to be so untenable, that it was abandoned, after a short attempt to press it, by the eminent counsel who represented the plaintiff.

I have referred to the existence in the present case of considerations other than the mere proof of a renewal, regular in form, and on this branch of the case also the authority of *Doe* d. *Brune* v. *Rawlings* (1) is of importance. Each of the renewals contains a recital similar in terms to those which I have already quoted from the renewal of 1879. This recital becomes for the first time of importance in the renewal of 1872, for the nomination which preceded the renewal of 1879 was certainly regular. I read this recital, occurring in each of the renewals, as a statement by the tenant for life that the nominations preceding the renewals had been made—that is to say, validly made—in pursuance of the covenant for renewal, that is, successively, in accordance with the covenant for renewal. If there were an ambiguity in this recital, it should be so construed as to give effect to the renewal, *ut res magis valeat quam pereat.*

I am further of opinion that this recital is evidence against the defendant as part of the act done by the preceding tenant for life, and as a statement made by her, in regard to a matter affecting the estate of which she had special means of knowledge. I do not think it necessary to discuss the further question, whether the recital is evidence, generally, as a declaration against interest by a deceased person. In *Doe* d. *Brune* v. *Rawlings* (1) a memorandum containing certain particulars of the estate, received by a preceding

(1) 7 East, 279.

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tenant for life from a confidential agent, and handed down to his successors, was held to be evidence for the plaintiff in an action by a remainderman brought under the circumstances which I have mentioned. "The question then is, whether this declaration of the then tenant for life so circumstanced (for it is to be considered only as a declaration by him), as to the existing rent of the tenement in question be evidence of that fact against" the defendant who claims from a succeeding tenant for life. "At this distance of time, with the means of knowledge which he had of the fact, and his interest in declaring it the other way, we think that his declaration is evidence of the fact to go to the jury. There are several instances in the books where the declaration of a person having knowledge of a fact and no interest to falsify it has been admitted as evidence of the fact to go to the jury" (*per* Lord Ellenborough, C.J.). But, while I am of opinion that the recital under consideration is evidence of the fact which it states, as part of an act done by the tenant for life, I do not regard it as an essential part of the defendants' case, as I am clearly of opinion that the effect of the renewal of 1879, independently of the recital contained in it, and in the renewal of 1872, was to cast the burden of proof on the plaintiff in the ejectment.

What then is the evidence upon which the plaintiff relies in support of the proposition that the lessee's right to a renewal had been lost at the date of the renewal of 1879? This question was submitted to the jury by the learned Judge in the following form: "Was a new life nominated from time to time by the lessee for the time being, on the fall of each life, down to the execution of the renewal, April 30, 1879?" To this question the jury answered "Yes." It rests on the plaintiff to satisfy us on the evidence in the case that this question ought to have been withdrawn from the jury and made the subject of a direction by the Judge, or that the verdict of the jury is such as reasonable men would not have arrived at, on a fair consideration of the evidence, having regard to the circumstance that the burden of establishing an answer to this question is the negative. If there is evidence proper to be submitted to the jury in support of the affirmative answer, the verdict and judgment cannot be disturbed.

I now proceed to examine the evidence upon which the verdict

of the jury was taken, and I must do so in some detail. It was the common case that the three lives nominated in the lease had determined before the renewal of 1852. It was admitted in the statement of claim that the tenant for life, Sir Compton Domvile, had on several occasions purported to renew the lease in the interval, and there was no reason to suppose that any of these renewals were informal. None of these renewals are in evidence; but the renewal of 1852 contains a recital that "the said indenture of lease of the 1st August, 1811, was afterwards several times renewed," and the last renewal was dated on or about the 11th day of January, 1845. The renewal of 1852 was executed by the tenant for life on the assumption that all these renewals were valid, for otherwise the deed would be a nullity. Of course, if the succession of lives had not been in fact kept up antecedent to 1852, the right of renewal would have been then lost, and no recital made or act done by the tenant for life could have reimposed the burden on the inheritance. But no evidence was offered of any such omission; and in my opinion the jury were not only entitled but bound to start with the proposition that the lease had been validly renewed on the 21st December, 1852, and that the lives in being at that date were those of the Prince Consort, the Right Honourable Maziere Brady, and the Right Honourable Francis Blackburne.

It is said that the renewals of 1845 and 1852 contain on the face of them evidence that the requirements of the covenant for renewal had not been complied with, and that the Judge ought to have so ruled; and the same argument is applied to the renewal of 1872. The renewal of 1845 is recited in that of 1852, as for the lives of George Moore, Ernest Augustus, King of Hanover, and the Prince Consort. It recites that George Moore and the King of Hanover were then dead. It further recites that Albert Revell, in whom the estate of the lessee was then vested, "in order to fill up the three lives according to the intent and meaning of the said recited indenture of lease of the 1st August, 1811, and to preserve and continue the estate in and by the said indenture granted pursuant to the covenant for renewal therein contained, hath nominated the life and lives of the Right Honourable Maziere Brady, late Lord High Chancellor of Ireland, and the Right Honourable Francis

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Blackburne, Lord High Chancellor of Ireland, to be added to the time and term of the said recited indenture of lease in the place and stead of the said George Moore, so deceased as aforesaid." The name of the other life then deceased, the King of Hanover, was here omitted by a mistake, which I shall notice presently. But reading this deed as a substitution of two lives for two then deceased it is contended that it appears on the face of the renewal that the succession of lives was not from time to time kept up, inasmuch as it deals contemporaneously with two lives. This argument is based on a confusion of the nomination of the life, which is to be made within a reasonable time after the death of the preceding life, and the execution of the separate deed, which in each case takes place subsequently to the nomination, and which separate deed or renewal may, by the express terms of the covenant, as I have already pointed out, deal with the "life or *lives* so failing, and the life or *lives* so added in lieu thereof." So far from this renewal negativing the successive nomination of the two lives with which it is conversant, it contains an express statement, in the terms on which I have already commented, that the lives had been nominated by the lessee "in order to supply and fill up the three lives according to the intent and meaning of the said indenture of lease, and pursuant to the covenant for renewal therein contained." If it could be shown that, notwithstanding this statement, the two lives had been nominated at the time of the execution of the renewal, this profession of adherence to the provisions of the lease would be of no avail. But no such evidence is before us.

And here a distinction which I have already noted between the covenant for renewal in the present case and that in the case of *Hussey* v. *Domvile* (1) becomes of importance. In the lease before the Court of Appeal a pecuniary fine was payable on the nomination of a new life; and the payment of this pecuniary fine, and also the nomination within six months, were conditions precedent to the execution of a valid renewal. In the words of Fitz Gibbon, L.J., p. 275:—"The document enlarging the term purports to be executed upon payment—not waiver—of the fine . . . and the preponderance of evidence is, that there was an actual

(1) [1903] 1 I. R. 265.

payment contemporaneous with the execution of the deed." In the opinion of each member of the Court, this circumstance was a fatal objection to a presumption in favour of the regularity of the nomination. Lord Justice Walker, referring to the receipt clause in the nomination, says, p. 278: "It is contended that all that is consistent with a nomination within six months—and that is not impossible, as the nomination must always precede the deed—and (it was also said) even as to the fine that payment within six months should be presumed. I could not in the case of the fine presume that, and, in my opinion, payment of the fine was a condition precedent" (see also *per* Lord Ashbourne, C., at p. 271, and *per* Holmes, L.J., at p. 281). If the payment of a pecuniary fine had been prescribed as a condition precedent in the lease of 1811, and if in the renewal of 1852, or any subsequent renewal, it had appeared from the receipt clause that two fines had been paid at the same date, upon two nominations, the case would be certainly different from that which is before us. The facts in *Doe* d. *Sperling* v. *Houghton* (1) are not fully stated in the note of the case in Lyne on Leases, Appendix, p. lxxxiv., but the existence of a fine appears from the judgment of Bushe, C.J., and it was probably on this ground that the Court of King's Bench gave judgment for the plaintiff in the ejectment.

In the present case the renewal of 1852 contains nothing on the face of it to contradict the recital of the parties that it was executed in pursuance of the covenant for renewal, and the jury were, as I have said, not only at liberty but bound to enter upon the inquiry as to the subsequent nominations, on the assumption that this was a valid renewal. I have already remarked that the two lives in that renewal are stated to be substituted for the single life of George Moore. When I noticed this error in the copy before me, I examined the original deed and found that it had been engrossed as a deed giving effect to a single nomination on the death of George Moore, and that the second life had been added by interlineation. I do not attach any greater effect to this circumstance further than as suggesting the danger of concluding from the mere fact of execution at a certain date of a formal

(1) Lyne on Leases, App., p. lxxxiv.

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renewal, consequent on the nomination of two lives, that both the nominations had been made at the date of the renewal.

Starting therefore with the renewal of 1852, we find that the first of the lives in this renewal to die was the Prince Consort, who died on the 14th of December, 1861. There is in evidence the engrossment of a renewal dated the 16th of July, 1864, which was not executed by the tenant for life of the reversion, Mrs. Malton, but which was adopted and acted on as a valid instrument by the parties to the renewal of 1872. It recites the nomination of the Right Honourable Nicholas Ball, in the place of the Prince Consort, and is in the usual form as to recitals and otherwise. In this instance a single nomination has been followed by a formal deed of renewal; but, as I have already pointed out, it was not essential that this course should have been followed. The next deed of renewal is dated the 20th March, 1872. It is in the usual form, reciting that the lease of 1811 had been several times renewed, the last renewals being those of 1852 and 1864, and that the three lives mentioned in the last renewal had since then departed this life. It recites in the same words as are used in the former renewals the nomination of three new lives, Earl Russell, the Marquis of Lorne (son of the Duke of Argyll), and Prince Albert Victor (son of the Prince of Wales), "to be added to the time and term of the said indenture of lease in the place and stead of the said Right Honourable Sir Maziere Brady, Baronet, the Right Honourable Francis Blackburne, and the Right Honourable Nicholas Ball, so deceased as aforesaid." If the plaintiff's argument is well founded, these three lives ought to be taken on the reading of this document as nominated and added to the term of the lease simultaneously at the date of its execution. But it clearly appears from the evidence before us that such an inference would not be in accordance with fact.

The Right Honourable Nicholas Ball died on the 15th of January, 1865, and the Right Honourable Francis Blackburne died on the 17th of September, 1867. There is in evidence a draft renewal which was submitted with an approval fee to Messrs. Alma & Hackett, solicitors for Mrs. Malton, the tenant for life, in 1869. It does not appear that the draft was approved, and no engrossment is forthcoming. This draft contains a recital

of the nomination of two new lives, in the terms of the recital on which I have already commented in the renewal of 1852. There is no evidence as to the date of the actual nomination of the lives, and, therefore, no contradiction of the recital that the nomination had been made in accordance with the intent and meaning of the lease, and in pursuance of the covenant for renewal therein contained. A pencil-note in the margin of the draft is relied on as evidence that the nomination of the lives was contemporaneous with the preparation of the draft. It does not appear by whom or when this note was made. It may have arisen from a confusion of the renewal with the preceding nomination, and it could not reasonably be relied on as against the recital to which I have referred. One of the lives, which appears from that draft to have been nominated before its preparation, is Earl Russell. There is also a second draft, which bears date the 26th March, 1871, which consists of the draft of 1869, with the name of the Marquis of Lorne substituted for that of the Earl of Derby, who had died on the 23rd October, 1869, after the date of the draft renewal in which his name appears. The renewal of 1872 corresponds with this draft.

These drafts are of great importance. They do not, indeed, disclose the respective dates of the nominations of the Earl of Derby and Earl Russell; but they prove to demonstration that one of the lives in the renewal of 1872, Earl Russell, had been nominated before the preparation of the draft of 1869, thus conclusively rebutting the inference which, according to the plaintiff's contention, should be drawn from the renewal of 1872, as to the contemporaneous nomination of the three lives mentioned in it; and they afford no evidence to contradict the recital in that deed, which, as I read it, affirms that the nominations on which it was founded were regularly made in pursuance of the covenant. If the renewal of 1872 was valid, no question can arise as to that executed in 1879, by which the life of Lord Longford was substituted for that of Earl Russell, who died on the 25th of May, 1878.

Thus the jury had to consider the effect of continued possession by the lessee and his successors in title for over ninety years under a series of renewals executed by successive tenants for life, any one of whom might have resisted the claim for a renewal if the right could be shown to be lost, each of these renewals being not only

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consistent with antecedent nominations in strict accordance with the covenant, but containing a recital which, as I read it, states that such was the fact.

Were the jury, upon this evidence, justified in answering in the affirmative the question put to them by the learned Judge? Were they at liberty, in the absence of positive evidence to the contrary, to presume the successive nomination of the lives with which the formal deeds of renewal were conversant? The following words of Lord Westbury have an application far wider than the particular facts of the case in which they are spoken: "I know no greater obligation that lies upon a Court of Justice than that of supporting long continued enjoyment by every legal means, and by every reasonable presumption": *Lee* v. *Johnstone* (1). I would add that in no class of cases is this obligation greater than in an action of ejectment brought by a remainderman, to disturb possession and enjoyment under successive renewals, valid on the face of them, and executed by successive preceding tenants for life of the settled estate.

There is authority for the application of the principle laid down by Lord Westbury to cases of a different kind: those in which the burden of proof rests throughout on the party asserting the validity of a renewal.

In an open contract for the sale of a lease the tenant's title must be affirmatively proved in an action for specific performance against an unwilling purchaser. Where a lease was granted by way of renewal, and the renewal was expressed to be made on the surrender of the existing lease, it was held that under a contract for the sale of the new lease the vendor was bound to prove the title of the lessee to surrender the existing lease. This would, in the case to which I refer, involve the investigation of transactions covering a long period of time. Even in a case of this kind, where the burden of proof rests on the vendor, in the words of Lord Langdale, M.R., "When you go to a certain extent back, the Court necessarily resorts to favourable presumptions arising from the facts brought before it": *Hodgkinson* v. *Cooper* (2). I have already noted the difference between the present case and the cases of *Hussey* v. *Domvile* (3), which

(1) L. R. 1 Sc. & D. App. at p. 435.
(2) 9 Beav. 304.
(3) [1900] 1 I. R. 417; [1903] 1 I. R. 265.

were actions of specific performance, in which it lay on the plaintiff to establish his right to invoke the active interference of a Court of Equity. But even in such a case it appears from the passages to which I have referred in the judgments of the members of the Court of Appeal, that they would have been prepared to entertain the question of such a presumption, if it were not for the conclusive evidence afforded by the receipt given for the payment of the fine which accompanied the nominations.

I refer to these cases to show the length to which Courts are prepared to go in presuming in favour of a long-continued possession, even when the burden of proof rests on the party in favour of whom the presumption is made. The case for the application of this principle is of course far stronger when, as in the present case, it is called in aid by a defendant in an action of ejectment, upon an issue in regard to which the burden of proof rests upon the plaintiff.

For these reasons I am of opinion that on production of the renewal of 1879 the burden of proof was cast upon the plaintiff to establish by affirmative evidence that the right to a renewal had been lost at the date of the nomination of the life which was then added to the lease. I am further of opinion that, in the absence of evidence to the contrary, the jury acted reasonably, and in accordance with a principle sanctioned by the highest judicial authority, in presuming regularity, in favour of long-continued possession under a succession of renewals, regular in form, executed by successive tenants for life, in apparent discharge of an obligation affecting the inheritance. I can find no evidence to prevent the application of so reasonable a presumption, and I am therefore of opinion that judgment should be entered for the defendants.

WRIGHT, J. :—

The present action is the outcome, logically and legally, of two decisions of the Court of Appeal—*Hussey* v. *Domvile* (*No. 1*) (1), and *Hussey* v. *Domvile* (*No. 2*) (2).

The lease in those two cases was for three lives, with a covenant by the lessor to renew by adding a new life on the death of any of

(1) [1900] 1 I. R. 417. (2) [1903] 1 I. R. 265.

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the *cestuis que vies* during a period of ninety years, on the lessee nominating the life so to be added within six months from the death of the *cestui que vie* in whose place the new life was to be inserted, and on paying a fine of 5*s*. In the first reported case (1) it was held by the Court of Appeal that the Tenantry Act did not apply to covenants to renew during a limited period; that in the case of such covenants time was of the essence of the contract; and that where, on the fall of one of the lives, the lessee allowed more than six months to elapse before nominating a new life, the delay not being due to any unavoidable accident, excusable ignorance, fraud, or surprise, but arising from mere neglect on the part of the lessee, there was no equity to relieve him from his own neglect, and he could not compel the lessor to execute a renewal for the life so nominated. In the second case (2) it was held by the Court of Appeal that, upon the true construction of the covenant in the lease (which will be found printed *in extenso* at pp. 266–7 of the report of the case), it prescribed, as necessary for obtaining a renewal, the condition that the lessee should renew regularly within six months from the fall of each life, so as always to maintain, except during such six months, the full number of three lives; and that, if he failed so to renew within six months from the dropping of any life, he lost his right of renewal.

The covenant in the lease, under which the lands sought to be recovered in the present action were held, is not identical in terms with the covenant so interpreted by the Court of Appeal. It will be found printed *in extenso* in paragraph 2 of the statement of claim. It will be seen that there is no limit of time within which the new life is to be nominated, which would, of course, convey that the nomination of the new life should be within a reasonable time from the fall of the old life. Other differences of language may be found; but, in my opinion, the general framework of the two covenants is the same, and I adopt and apply to the covenant in the present lease the reasoning of the four Judges of the Court of Appeal (see particularly the judgment of Lord Ashbourne, C., at pp. 272–3, and FitzGibbon, L.J., at p. 275); and I come to

(1) [1900] 1 I. R. 417. (2) [1903] 1 I. R. 265.

the conclusion without, so far, any doubt or difficulty, that the covenant has been framed so as to compel the lessee always to keep three lives in being, and that, if he fails to keep three lives always in being, the right of renewal is gone.

The contrary view, that there was no obligation on the lessee to nominate a new life on the fall of each life, provided the nomination was made at any time within the term of seventy years, was not very strenuously argued before us, though it will be found among the requisitions put forward by Mr. Chaytor, K.C., on behalf of all the defendants at the close of the plaintiff's case.

At the trial the learned Judge left to the jury one question, and one only, viz., Was a new life nominated from time to time by the lessee for the time being on the fall of each life down to the execution of the renewal of the 30th April, 1879?—which was answered in the affirmative. He was asked to leave another question to the jury—"Did plaintiff stand by and allow money to be expended on the demised premises by the defendants, or any of them, on the faith and understanding that the lease of 1811, and the several renewals of it, including the last renewal of 1879, were valid and binding?" But he declined to do so, being of opinion that there was not evidence reasonably sufficient to support an affirmative finding upon it. His ruling has not been challenged, and accordingly the question we have to consider is, Was there evidence fit to be submitted to the jury to sustain their finding—a finding in favour of the defendants on the only question left to them? Plaintiffs' counsel at the trial objected to this question being left to the jury, and contend that there was no evidence to sustain the finding. It therefore becomes necessary to examine the evidence adduced on both sides. Plaintiffs gave in evidence the original lease of 1811, which was several times renewed, and the renewal dated the 21st December, 1852, which was for the lives of the then Prince Consort, Sir Maziere Brady, and ex-Lord Chancellor Blackburne, and gave formal proof of the dates of the deaths of these several lives. Defendants gave in evidence the engrossed renewal of the 16th July, 1864, the draft of it, and two drafts of 1869 and 1871, respectively, and two renewals dated 20th March, 1872, and 30th April, 1879, respectively. The engrossed renewal of 1864 is executed by the lessees only, not by

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the lessor, and it is a renewal for the lives of Sir Maziere Brady, ex-Lord Chancellor Blackburne. and Judge Ball, two of these—*i.e.*, Brady and Blackburne—having been nominated and added as lives to the previous renewal of the 21st December, 1852, and Judge Ball being then—*i.e.*, July, 1864—added in place of the Prince Consort, who died in December, 1861.

While plaintiffs' counsel are careful not to admit that this renewal of July, 1864, was a legal and valid renewal, it is sufficient for me to say that it has not been in any way impeached, and on the evidence there is nothing to show that up to this date the right of renewal had been lost, and, accordingly, the critical period is the eight years that elapsed from 1864 to 1872; for it is clear that if the renewal executed in 1872 is valid, so also is the renewal executed in 1879. I assume that Brady, Blackburne, and Ball were validly nominated and became new lives in the renewal of 1864, in strict conformity with the covenant.

Ball died in 1865, January 15th; Blackburne in 1867, September 17th; leaving Brady sole survivor. A draft renewal, dated in September, 1869, was given in evidence for defendants, furnished by the solicitor for the Callwells to the solicitors for Mrs. Malton, who became tenant for life in possession in 1857, nominating two new lives, Earl of Derby and Earl Russell, in place of the two lives who had dropped, Blackburne and Ball, in addition to the surviving life, Brady. The proposed substitution of these three lives—two new and one old—for the three lives in the renewal of 1864 was never carried into effect, in consequence, apparently—I might say obviously—of the death in the following month, 23rd October, 1869, of the Earl of Derby; and, so far as direct evidence goes, nothing further was done until a draft renewal—the old draft of 1869 altered to 1871—was sent for approval in April, 1871. The date appears on it—"Sent for approval, 26th April, 1871." Sir Maziere Brady had died on the 13th April, 1871, and the three lives named in the draft renewal are Earl Russell, already nominated in draft renewal of September, 1869, the Marquis of Lorne, and Prince Albert Christian Victor. This draft is marked as approved of by the solicitors for Mrs. Malton on the 5th March, 1872, and was followed by the engrossed renewal dated 20th March, 1872, duly executed by the lessee and Mrs.

Malton, the tenant for life, upon which the defendants rely. Mrs. Malton was tenant for life in possession, and in receipt of the rent payable under the lease from 1857 to 1891, and was, under the will of Compton Charles Domvile the elder, expressly authorized to grant renewals to every tenant who was entitled to a renewal. She was undoubtedly the proper person to grant renewals during the long period of her life tenancy. I cannot, however, accede to the proposition that she could revive as against the inheritance, or re-impose upon it, the burden and obligation of a covenant that had been allowed by the lessee to drop. It seems clear, on ordinary general principles, that her act in granting a renewal in 1872, if the right to renew had been then lost, could not bind the inheritance, although it would, of course, be good against her life estate. This is one of the matters decided by the Court of Appeal in *Hussey* v. *Domvile* (1), though, really, on this point no authority is required. As to this I entertain no doubt, and wish to dispose of it at once, so as to clear the way for the more serious and difficult questions which arise in the case.

On whom is the burden of proof? I beg to cite, as applicable to the facts of the present case, the words of Lord Westbury in *Lee* v. *Johnstone* (2):—"I know no greater obligation that lies upon a Court of Justice than that of supporting long-continued enjoyment by every legal means, and by every reasonable presumption. . . . The doctrine of presumption goes on the footing of validity, and upholds validity by supposing that everything was present which that validity required. The great principle, *Omnia praesumuntur rite fuisse acta*, is the principle that ought to be observed." See to the same effect the language of Bowen, L.J., in *Postlethwaite* v. *Rickman* (3)—"The general presumption which the law makes is in favour of good faith and validity of transactions, and not against them; and that presumption ought to acquire, and does acquire, weight from the length of time during which the transaction has subsisted." In the present case, matters that occurred nearly forty years ago are now challenged, at a time when most of the actors in them have long passed away; and it seems to me that we are justified in making every

(1) [1906] 1 I. R. 417. (2) L. R. 1 Sc. & D. App. at p. 435.
(3) 60 L. J. 514, at p. 520.

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presumption we can in order to uphold transactions closed and concluded at the time between the parties, represented, as they were, by competent legal advisers on both sides, and in accordance with which possession has ever since gone. We ought, if possible, to presume that those advising the tenant for life were vigilant to see that the lessee did everything necessary to entitle him to the benefit of the covenant for renewal, and was in a position to enforce his right to it. Considering all the changes by death and removal of legal firms, is it reasonable now to expect defendant, who is in possession under a renewal executed by the person legally competent to renew, to produce the paper or papers nominating from time to time the several new lives on the dropping of the old lives? The nomination is, of course, distinct from and must precede the renewal. Is such a burden cast upon the defendants? In my opinion it is not. The onus of proof is on the plaintiff. I do not think he has discharged that onus. Apart from the onus of proof, was there evidence to go to the jury to support their finding? Defendants rely on the evidence furnished by the draft renewals, and on the recitals in the renewals of 1864, 1872, and 1879, executed by Mrs. Malton, the tenant for life, now deceased. Are these recitals evidence of the facts stated in them against the plaintiff?

The covenant was one for the benefit of the lessee. It was obviously for the interest of the tenant for life to be rid of the burden of it—in fact, so far as interest, pecuniary or proprietary, was concerned, Mrs. Malton was exactly in the same position as the plaintiff, and it would have been just as much to her advantage to have got rid of this covenant, and thus been enabled to deal directly with the occupying tenants, as the plaintiff. On this point I wish to cite the case, already referred to, of *Doe* d. *Brune* v. *Rawlings* (1). At pp. 289, 290, Lord Ellenborough says: "'Indorsement from Hobart, a particular of my estate in Cornwall'—thereby importing that the writer bore the degree of relation to the estates and their owner which he purports to do on the face of the paper, and that the owner considered the paper as an actual particular of his estates. The question then is, whether this declaration of the

(1) 7 East, 279.

tenant for life so circumstanced (for it is to be considered only as a declaration by him), as to the existing rent of the tenement in question, be evidence of that fact against a succeeding tenant for life of the estate, having a similar limited power of leasing, reserving the ancient rent, who claimed as a purchaser; for if he had derived title from the former tenant for life, by whom the indorsement was made, the case would have been quite clear. And we think it is also evidence against the defendant who claims from a succeeding tenant for life."

On principle, I think these statements are evidence of the facts stated; but then it is said that it is uncertain what the recital means, that it is ambiguous, and does not expressly say that the covenant had always been strictly observed and complied with—in fact, that the language of the recitals is referable to either construction of the covenant for renewal. Does this mean that as one life dropped another was nominated in its place, and so on? or does it say that the lessee at one and the same time nominated three lives in place of three that had dropped? The words are, "In order to supply and fill up the three lives according to the intent and meaning of the said recited indenture of lease . . . are, pursuant to the covenant for renewal therein contained, nominated," &c. I think we are bound to give effect to these words, and to hold that the nominations were in accordance with the true meaning of the covenant, and not in contravention of it. On these grounds, shortly stated, I hold that this recital was evidence against the plaintiff to go to the jury that as each life dropped a new life was duly nominated, in accordance with the meaning of the covenant. There is further evidence, furnished by the draft renewals, which, notwithstanding the long lapse of time, and the disappearance and break-up of legal firms, are forthcoming, that lives were in some instances nominated long anterior to the execution of a renewal. I think there were these two classes of evidence in support of the finding sufficient to sustain it.

Accordingly, I am of opinion that the defendants are entitled to verdict and judgment.

Solicitors for the plaintiffs: *Falls & Co.*

Solicitors for the defendants: *Montgomery & Chaytor; E. C. Jameson.*

J. L.

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Feb. 26.
June 4.

Appeal.
Oct. 30, 31.
Nov. 4.

WILKINS *v.* M'GINITY (1).

Landlord and tenant—Lease—Term from 1st November—Power to surrender at end of year on giving three months' notice beforehand—Notice served on 1st August of intention to surrender on 1st November following—Time—Months, whether lunar or calendar.

By agreement in writing, dated the 2nd October, 1902, the defendant agreed to let to the plaintiff certain premises in the town of Dundalk for 500 years from the 1st November, 1902, at the yearly rent of £100, payable half-yearly in advance on the 1st May and 1st November in each year, with a proviso that the plaintiff should be at liberty to surrender the premises at the end of the first two years on giving three months' notice beforehand of his intention to do so. On the 30th July the plaintiff sent to the defendant by registered post a notice of his intention to surrender on the 1st November, 1904. The letter was not delivered to the defendant until the 1st August:—

Held, by the King's Bench Division (Lord O'Brien, L.C.J., and Johnson, J.; *diss.* Wright, J.) and by the Court of Appeal, that, whether the word "months" was to be read as calendar or as lunar months, a notice served on the 1st August, 1904, of intention to surrender on the 1st November following was good.

Case Stated by the Lord Chief Baron on hearing of a civil-bill appeal for the opinion of the King's Bench Division.

The appeal was from a dismiss by the County Court Judge of a civil-bill brought by the plaintiff to recover the sum of £30 money due by the defendant to the plaintiff under an agreement in writing dated the 2nd October, 1902, which the defendant agreed and undertook under said agreement to pay, and for money paid by the plaintiff for the use of the defendant at his request, and for money found to be due from the defendant to the plaintiff on an account stated between them, all within the past six years.

By an agreement in writing dated the 2nd October, 1902, and made between Joseph P. M'Ginity, the defendant, of the one part, and Robert Wilkins, the plaintiff, of the other part, it was

(1) In the King's Bench Division, before Lord O'Brien, L.C.J., and Johnson and Wright, JJ.

agreed that the defendant should let and the plaintiff should take certain premises known as the Victoria Mills, in the town of Dundalk, "for the term of 500 years, from the 1st day of November, 1902, at the yearly rent of £100, payable half-yearly in advance, . . . the first payment in advance to be made on the execution of these presents, and the payment of the remainder of the said half-yearly rent shall be payable on the 1st May and 1st November in each year." The said agreement provided that the defendant would, on the request of the plaintiff, execute a proper lease of the premises, and that the said lease should contain amongst other covenants a covenant "that the lessee shall within a reasonable time erect a hay-shed and office in addition to the said premises, to be demised at a sum not exceeding £30, and shall also contain a clause to surrender the premises at the end of the first two years on giving three months' notice beforehand of such intention; or, in case of the death of the lessee, his executors, administrators and assigns shall be at liberty to surrender the said premises within three months after the death of the said lessee; and in the event of surrender by the lessee in his lifetime within the time mentioned, that the said lessee, his executors, administrators, and assigns, shall be entitled to be recouped in the actual sum expended by him in the erection of the said shed and office, and no more, and in no case shall the amount of such expenditure exceed the sum of £30." The plaintiff entered into possession of the premises under the agreement, and erected the hay-shed and office at an expense exceeding the sum of £30. On the 30th July, 1904, the plaintiff sent to the defendant, by registered post, a letter intimating his intention to surrender the said premises on the 1st November, 1904. The letter was addressed to Joseph P. M'Ginity, merchant, Dundalk, and should in ordinary course have been delivered to the defendant on Sunday, the 31st July. It was proved, however, that the letter was not, in fact, delivered at the defendant's premises, or otherwise delivered to the defendant, or brought to his knowledge, until the morning of Monday, the 1st August.

The Chief Baron held as a fact that notice was not given to the defendant until the 1st of August, and was of opinion that such notice was not sufficient notice under the agreement, but, at

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the request of the plaintiff's counsel, consented to state a case on this latter point.

His Lordship added—"If my ruling on this point is wrong in law, then the plaintiff is entitled to a decree for the sum of £30 and costs; otherwise the dismiss should be affirmed.

"The question for the opinion of the Court is whether my decision of the foregoing question of law was correct."

Chaytor, K.C., and *Hanna*, for the plaintiff.

Healy, K.C., and *Donaldson*, for the defendant.

June 4.

WRIGHT, J.:—

The case of *Rogers* v. *Kingston-upon-Hull Dock Company* (1) is a decision of Vice-Chancellor Wood, that where a tenancy from year to year is determinable upon six months' notice to quit, a notice given six lunar months prior to the expiration of the year is sufficient to determine the tenancy. But this decision does not stand alone. By other decisions, and by statute, a different meaning has been given to the word "month," where it occurs alone.

Prior to 1850, the word "month," when used in a statute without the addition of "calendar," or any other words to show that the Legislature intended calendar, was understood to mean a lunar month; but this has long been changed, and for upwards of fifty years past "month," when used in an Act of Parliament, has meant calendar month (12 & 13 Vict. c. 21, 52 & 53 Vict. c. 63). It follows that, all through the Landlord and Tenant (Ireland) Act of 1860 (23 & 24 Vict. c. 154), a consolidating and amending Act still regulating the law of landlord and tenant in Ireland outside agricultural and pastoral holdings, it has this meaning. Similarly, in the Rules of Court, not merely the present Rules under the Judicature Act, but the Rules made in 1854, under the Common Law Procedure Act of 1853, the word "month" is declared to mean calendar month. It has been held that in commercial contracts a month means a calendar month: *Hart* v. *Middleton* (2). The general rule is stated to be, that where in

(1) 34 L. J., Ch. (N. S.) 165. (2) 2 C. & K. 9.

any written instrument the word "month" alone is used, the context may be looked to, to see in what sense the parties used it, whether lunar or calendar month; in fact, that the question whether it means lunar or calendar month depends upon the intention of the contracting parties, to be gathered from the language of the contract: *Lang* v. *Gale* (1).

By the contract in the present case, the premises are let for the very long term of 500 years, commencing from the 1st November, 1902; the rent is to be payable in advance, and half-yearly, on the 1st of May, and 1st November. There is a power of surrender at the expiration of the first two years of the term, on giving three months' notice beforehand of such intention. Having regard to the frame of the lease or agreement for a lease, that it is for a long term of years, and that the rent is payable half-yearly, I am of opinion that this power of surrender early in the term, at the end of the first two years, by giving three months' notice, means a quarter's notice; in other words, that the months are calendar and not lunar months. It may be immaterial, and probably is, but it is obvious that the plaintiff himself so understood it; and in truth it appears to me that at the present day parties when making a contract, whether parol or written, think of a month as meaning a calendar month, the twelfth part of a year, and nothing is further from their minds than the idea that they are stipulating for lunar months, or a lunar month, and to import such a qualification into the contract in the present case would in my opinion defeat the intention of the parties.

The notice of surrender was in fact not given until the 1st of August, 1904. This has been found as a fact by the Lord Chief Baron. Is this sufficient?

The first of November, 1902, is made the *terminus a quo* of the term of 500 years, and in my opinion, following the decision of the English Court of Appeal in *Sidebotham* v. *Holland* (2) and the several cases there cited, that day, November 1st, 1902, is the first day of the term, so that the first and each succeeding year of the term would be completed on the 31st October, which day would be included in the year. The general rule is that the day

(1) 1 M. & S. 111. (2) [1895] 1 Q. B. 378.

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of service, *i.e.*, here August 1st, is excluded in computing the period of time, and while the tenant, if a sufficient notice were given, would be entitled to hold on until the last minute of the day, *i.e.* October 31st, and could not be compelled to leave, and possession could not be legally demanded, until the next day, November 1st, began, yet in my opinion three months' notice of surrender at the expiration of the first two years of the term, which means, as I have already stated, three calendar months, could, on the authority of *Sidebotham* v. *Holland* (1), *Right* v. *Darby* (2), and other cases, have been given for the 31st October, 1904, and whether given for that day or for the 1st November, should have been given on the 31st July, 1904, at the latest.

I therefore think the notice in the present case was bad, and the dismiss ought to be affirmed.

JOHNSON, J.:—

When the agreement of October, 1902, was entered into, the plaintiff lived in Belfast, and the defendant in Dundalk. Therefore, as the agreement did not require personal service of the notice to surrender, the parties contemplated notice being given through the G. P. O., the usual and ordinary mode of communication between persons living at a distance from each other. In ordinary cases the communication of the sender is not received by the person to whom it is addressed until actually delivered at the address by the Post Office through which the sender transmits it. Up to that time it might be countermanded by telegraph or otherwise. The case finds that the notice of surrender was so delivered on the morning of the 1st August, and the question for decision is, was that sufficient notice within the term of the agreement by which the premises were let to the plaintiff for the term of 500 years from 1st November, 1902, and it was thereby provided that the plaintiff should be at liberty to surrender the premises at the end of the first two years on giving three months' notice beforehand of his intention to do so. The term of 500 years being limited from 1st November is to be computed as

(1) [1895] 1 Q. B. 378. (2) 1 T. R. 159.

excluding that day and including 1st November, 1904, as the end of the first two years: Leake, Contracts (5th ed.), p. 601; 1 Furlong, L. & T. (1st ed.), p. 184, par. 7. Therefore, on giving due notice the plaintiff was at liberty to surrender on 1st November, 1904, and he had the whole of that day, or, at all events, up to some reasonable hour of that day before night-fall, to make his actual surrender: and if the notice was delivered at the address at any time before the actual surrender in fact (as presumably it was in this case, the notice being delivered on the morning of 1st August), the plaintiff would have given three calendar months' notice beforehand of his intention to surrender. "Beforehand" is not a term of art; it is a word in common use, and means beforehand in relation to some event. The event here was the surrender in fact of which defendant would thus have had notice three calendar months before that event occurred. Independently, however, of this construction of the word "beforehand," I think the words "three months" mean three lunar months. "In legal matters a 'month' means a lunar month, but in commercial matters 'a month' always means a calendar month. In bills of exchange, promissory notes, invoices, times of credit, and everything else relating to commercial matters, it is so; and I know no instance to the contrary": Pollock, C.B., in *Hart* v. *Middleton* (1). "It is clear that 'months' denote at law 'lunar months' unless there is admissible evidence of an intention in the parties using the word to denote 'calendar months'": Lord Denman, C.J., in *Simpson* v. *Margetson* (2). To the same effect is the decision of Wood, V.-C., in *Rogers* v. *Kingston Dock Company* (3); and to make the word "month" read "calendar month" in Acts of Parliament required the Interpretation Act, s. 4, and Bills of Exchange Act, s. 14 (4). In the present case the parties made their own contract by special agreement in writing in ordinary terms enabling the plaintiff to surrender and determine the term and tenancy at the end of the first two years of the term without reference to quarterly days or half-yearly days or anniversaries or any of the usual Feast days agreed on for payment of rent or otherwise. They were quite at liberty to do so (39 & 40 Vict. c. 63, sect. 6); and there is no

(1) 2 C. & K. at p. 10. (2) 11 Q. B. 31. (3) 12 W. R. 1102.

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evidence that they used the word "month" to denote calendar "months"—if they had so intended, they ought to have said so. Therefore, whether "months" is to be read as calendar or lunar months, I think the notice sufficient within the agreement.

LORD O'BRIEN, L.C.J. :—

The defendant in this case insists upon the very letter of his agreement—upon what he considers his strict rights under the agreement he has entered into with the plaintiff. If this view is correct, we must give effect to it. What, then, is the agreement we have to construe, and what is the defendant's contention? The case which has been stated for our determination by the Lord Chief Baron tells us what the agreement was, and states all the facts as succinctly as they could be stated. [His Lordship read the agreement of the 2nd October, 1902.] This is the agreement. What does the word "months" mean? If it means "lunar" months, the notice of surrender was *ex concessis* in time. Suppose the word "months" meant calendar months, and the word "from" was inclusive of the 1st day of November, was then the notice of surrender in time? I am of opinion upon the true construction of the agreement that the word "months" meant calendar months, that the word "from" is to be read as inclusive of the 1st day of November, and that, nevertheless, the notice of surrender was not late. See what my brother Gibson says in *Irish Land Commission* v. *Massereene* (1) as to the word "from" being inclusive in the computation of time in the case of "lettings."

Now it has been decided that a notice to quit on the anniversary of the day of the commencement of the tenancy is a good notice: *Sidebotham* v. *Holland* (2). That is an important case. The head-note correctly and succinctly states the facts and decision. The head-note is as follows:—"By an agreement in writing the plaintiff agreed to let a house to the defendant as yearly tenant, 'commencing on the 19th of May, 1890,' an apportioned part of the rent, up to June 24 next, to be paid at once, and the future rent to be paid quarterly in advance on the usual quarter-days. On November 17, 1893, the plaintiff gave the defendant notice to

(1) [1904] 2 I. R. 502, at p. 513. (2) [1895] 1 Q. B. 378.

quit on May 19 following; and subsequently brought an action to recover possession of the premises. The defendant disputed the validity of the notice to quit, and also set up an oral agreement made in December, 1892, that the tenancy of the house should not be terminated till November, 1895. The plaintiff, in reply, pleaded the 4th section of the Statute of Frauds. *Held*, that the tenancy must be taken to have commenced on May 19, and not on June 24; that the day mentioned in a demise as the commencement of the tenancy is the first day of the term, whether the expression used be 'on' the day specified or 'from' that day; and consequently that a notice to quit on May 18 would have been good. But *held* (A. L. Smith, L.J., doubting), that the notice to quit on May 19 was also good, that being the anniversary of the commencement of the term."

So far as relates to the matter under discussion, there is no material difference between, say, three months' notice to quit, and three months' notice of surrender. If three months' notice to quit on the anniversary of the commencement of the tenancy would be good, so ought to be three months' notice of surrender, expiring on the anniversary of the day of the commencement of the tenancy. Lord Lindley's judgment in *Sidebotham* v. *Holland* (1) is an interesting and exhaustive one, and represents the opinion of Lord Halsbury, as well as of himself. He tells us at pp. 382 and 385 what the point for decision was. The question was not as regards the length of the notice, for the notice was served on the 17th November, but whether a notice to quit on the anniversary of the day of the commencement of the tenancy, namely, the 19th May, was a good notice. Let it not be said that I overlook the fact that in the case of *Sidebotham* v. *Holland* (1), the notice to quit was served on the 17th November. Lord Lindley is reported to have said at the pages I have mentioned: "Treating the tenancy as commencing on May 19, 1890, the question is, whether a notice to quit on May 19, 1894, given by the landlord on November 17, 1893, is a good notice" (see p. 382). The Lord Justice, after referring to certain decided cases, proceeds (p. 383), "If, therefore, notice to quit on the 18th were given, it

(1) [1895] 1 Q. B. 378.

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Lord O'Brien, L.C.J.

would no doubt be good. . . . *But although a half-year's notice to quit on the 18th would be correct, it does not follow that a notice to quit on the 19th, which is the anniversary of the day on which the tenancy commenced, is bad, and I am clearly of opinion that it is not.* . . . I should be very much surprised to find such a case. The validity of a notice to quit ought not to turn on the splitting of a straw." This is the language of Lord Lindley.

Now then in the case before us, the notice of surrender served on the 1st August would be a good notice for the 1st November, assuming the tenancy to have commenced on the 1st November, as I think it did. The 1st of November would be the anniversary of the day of the commencement of the tenancy; and a notice to surrender on that day would be a good notice. If the whole of the 1st August is counted, as I think it should be, the three calendar months would expire on the 31st October. If the 1st August is excluded, the three calendar months would expire on the 1st November. If the tenancy commenced on the 2nd day of November, I think the notice to surrender on the 1st November, which would be the last day of the tenancy, would have been good. I think in this case, though the notice of surrender did not reach the hands of the defendant till 10 o'clock on the 1st August, nevertheless the whole of the day should be counted, and no notice taken of a fraction of a day; that there should be, in the language of Lord Lindley, no splitting of straws. It is to be remembered that the provision for surrender of the premises, with which we are dealing, is not a forfeiture clause. It is not a provision for the payment of double rent, as Lord Lindley said in *Sidebotham* v. *Holland* (1), referring to *Page* v. *More* (2). It is a provision in ease of, and for the benefit of, the tenant.

However this case is to be viewed—whether the word "months" is to be read as lunar months—a question not free from difficulty—or whether the tenancy commenced on the 1st or 2nd November, and the word "months" is to be read, as I think it should be, as calendar months—I think the notice of surrender was not late. The case of *Fleury* v. *O'Reilly* (3), though I do not say it at all

(1) [1895] 1 Q. B. at p. 384. (2) 15 Q. B. 684. (3) 40 I. L. T. R. 125.

concludes the matter, tends, I think, in some degree, to support the view I have taken. The question put to us by the Lord Chief Baron must be answered accordingly, and the plaintiff declared entitled to the costs of this argument, including the costs connected with the statement of the case.

J. G. T.

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The defendant appealed (1).

Appeal. Oct. 30, 31. Nov. 4.

Donaldson (with him *Henry, K.C.*, and *Healy, K.C.*), for the appellant :—

The notice of surrender was not served in time to terminate the tenancy within the meaning of the agreement. In legal computation of time months *prima facie* mean lunar months, unless it is plain that it was the intention of the parties that calendar months were intended: *Bruner* v. *Moore* (2). Here it is clear from all clauses of the agreement that calendar months were intended. The Interpretation of Terms Act (52 & 53 Vict. c. 63), which defines months as calendar months (sect. 3), is confined to statutes. This tenancy was to commence *from* the 1st November, 1892, and so the 30th April and the 31st October were the last days of the half-years of the term. When a lease is made "from" a day, that may mean that that day is included: *Pugh* v. *Duke of Leeds* (3); *Wilkinson* v. *Gaston* (4). The rent was payable in advance, and the notice of surrender was to be a three months' notice of surrender beforehand, consequently the notice required here was a three months' notice terminating on the 31st October, 1904. *Sidebotham* v. *Holland* (5) may apply to the case of an ordinary tenancy, but cannot govern a case like the present, which stipulates for a notice before the expiration of the first two years of the tenancy. It is a question, not of general law, but of the construction of the particular agreement.

(1) In the Court of Appeal, before THE LORD CHANCELLOR, and FITZ-GIBBON and HOLMES, L.JJ.

(2) [1904] 1 Ch. 305.

(3) Cowp. 714.

(4) 9 Q. B. 137.

(5) [1895] 1 Q. B. 378.

Appeal. 1907.

WILKINS *v.* M'GINITY.

Chaytor, K.C., and *Hanna* (with them *Chambers, K.C.*), for the respondent :—

The notice of surrender was sufficient on any one of four grounds :—

1. In legal documents the primary meaning of "months" is lunar months, and *not* calendar months, unless there is something in the context to the contrary : *Rogers* v. *Kingston-on-Hull Dock Co.* (1) ; *Bruner* v. *Moore* (2).

2. In computing time you begin from the 1st day of the term, and do not include both the first and the last day. The term began on the 2nd of November, and the half-year ended on the 1st May, consequently notice of surrender served on the 1st of August was good. As to the difference between "from" and "on" for the commencement of the term, see the judgment of Gibson, J., in *Irish Land Commission* v. *Massereene* (3).

3. Posting the letter was effectual service of the notice on the day upon which it was posted : *Henthorn* v. *Fraser* (4) ; *Papillon* v. *Brunton* (5).

4. But our main contention is that the day mentioned in the agreement as the commencement of the term, is the first day of the term, and a notice of surrender for the anniversary of that day is good. So the notice of surrender served on the 1st of August for the 1st of November is sufficient : *Sidebotham* v. *Holland* (6) ; *Quartermaine* v. *Selby* (7) ; *Soames* v. *Nicholson* (8) ; *Fleury* v. *O'Reilly* (9) ; La Touche's Furlong, p. 608 ; Woodfall's Landlord and Tenant (17th ed.), p. 396.

Nov. 4.

THE LORD CHANCELLOR :—

The question in this case is, whether a notice of surrender, given by the tenant, M'Ginity, on the 1st August, to terminate the tenancy on the 1st November, was in time within the meaning of the contract of letting. If it was, the plaintiff will be entitled to a decree for £30 and costs in the civil bill action brought by him.

(1) 34 L. J., Ch. (N. S.) 165.
(2) [1904] 1 Ch. 305.
(3) [1904] 2 I. R. 513.
(4) [1892] 2 Ch. 27.
(5) 5 H. & N. 518.
(6) [1895] 1 Q. B. 378.
(7) 5 T. L. R. 223.
(8) [1902] 1 K. B. 157.
(9) 40 I. L. T. R. 125.

The Lord Chief Baron, at the hearing of the appeal, was of opinion that the notice was not in time, and Wright, J., in the Court below, concurred in his view. The other two Judges arrived at a different conclusion; but the grounds of their judgments are not identical.

The question depends on the true construction of the contract of the 2nd October, 1902, regulating the terms of a lease which was to be granted of premises in the town of Dundalk.

The letting was to be for a term of 500 years from the 1st November, 1902, at the yearly rent of £100, payable half-yearly in advance on the 1st May and 1st November in each year.

The agreement then goes on to provide as follows:—[The Lord Chancellor read the terms of the agreement, *ante*, p. 661.]

Four grounds were put forward by the respondent's counsel in support of the contention that the notice for the 1st November, which reached the landlord on the 1st August, was in good time within the contract.

I shall notice two of them in order to dispose of them at once. One was that the posting of the registered letter on the 30th July was sufficient, and that the tenant was not responsible for the delay in the delivery by the Post Office. I do not think the cases deciding that the acceptance by post of an offer was complete when the acceptance was posted have any application to the case where a notice of surrender is contracted to be given as an initial step. It was not within the contemplation of the parties that the Post Office should be the medium for conveying such a notice. *Henthorn* v. *Fraser* (1) seems a complete authority on this point, and Kay, L.J., in illustration of his decision that a withdrawal of an offer to sell did not operate from the posting of it, says:—"A notice by a tenant to quit can have no operation till it comes to the actual knowledge of the person to whom it is addressed."

Another point made was, that the term did not begin until the 2nd November. In my opinion the term began on the 1st November, although the word "from" is used. The rent is payable on the 1st day of May and 1st day of November. In the case of lettings, I think "from" is inclusive.

(1) [1892] 2 Ch. 27.

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The Lord Chancellor.

The third point, in which there is much more substance, was that months in the agreement mean lunar months, and, therefore, that a notice of eighty-four days would be sufficient. It is not necessary, according to the view I take, to decide this point, and I assume, for the purpose of my judgment, that months mean calendar months. In the instrument of letting, and having regard to all its provisions, I think calendar months were within the contemplation of the parties. The other considerations referred to by Wright, J., come in aid of that view.

But, assuming all that, I still think that a notice given on the 1st August for the 1st November was a good notice of surrender. Such is the view of Lord Halsbury, and Lindley, L.J., in the case of *Sidebotham* v. *Holland* (1).

Mr. Furlong, in his work, also takes that view. I refer to the original text-book, at p. 608. There is no difference in this respect between a notice to quit by a landlord, and a notice of surrender by a tenant. It does not follow that a notice might have not been given on the 31st July for the 31st October. The decision in the case of a weekly letting, that a notice on Monday for the following Monday was good, is the same in principle. The word "beforehand," on which reliance was placed, goes no further than "previous."

The decision appealed from is, in our view, correct in result, and the appeal must be dismissed with costs.

FITZ GIBBON, L.J.:—

I concur with the Lord Chancellor. In ascertaining whether the parties to the written agreement *meant* lunar months or calendar months, we are not confined to the terms or context of the document; we may have regard also to its nature and subject-matter. I do not decide the question, and my judgment rests on another ground; but the matter is of importance, and my present opinion is that on the face of *this* agreement, having regard to its being a contract of tenancy, and to the statute law as to notices to quit, and to the meaning of "months," the context is sufficient to show that "months" meant calendar months. The agreement

(1) [1895] 1 Q. B. at p. 383.

said that the defendant let, and the plaintiff took, the premises for 500 years, from the 1st day of November, 1902, at the yearly rent of £100 payable half-yearly *in advance* on the 1st day of May and 1st day of November in each year. Therefore, each "half year" consists of six calendar months. "*Tempus Semestre*" at Common Law meant six calendar months; and here I hold that each half-year's rent was payable in advance on the first day of the half year. The agreement then provided that the plaintiff should be at liberty to surrender the premises at the end of the first two years—*i.e.*, on the last day of a calendar month—on giving *three months notice beforehand* of his intention to do so. Is it not more than a presumption that these three months were three of the six months which made up the half year, and of the twelve months which made up the year, of the tenancy? Can we doubt that the parties did not mean that eighty-four days notice should be enough?

I don't know why the Legislature (1) when declaring "month" to mean calendar month, unless the contrary intention appears, confined itself to statutes passed after 1850, and did not impute the same primary meaning to ordinary men which it declared to be its own. It must be admitted, however, that twenty-eight days was, and perhaps still is, the primary meaning of "month" at Common Law. That was a mere convention, for the "fickle luminary" gives no certain measure of time: for example, last February's moon took twenty-nine and a-half days to "wax and wane"; and I should be sorry to find myself coerced, by respect for tradition, to hold that the parties to this agreement, speaking of "three months," were thinking of the moon, or of twelve weeks.

On the second point, we can find the day on which the term ended, if we can fix the day on which it began, and *vice versâ*. I am clearly of opinion that the 1st day of November, 1902, was the first day of the demise; that the last day of the first half-year was April 30, 1903, and that October 31 *de anno in annum* was to end each year of the term of 500 years. The rule for computing time must be the same for a notice of surrender as for a notice

(1) 52 & 53 Vict. c. 63, s. 3.

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to quit. I am satisfied, on the authorities, that either of two forms of "three calendar months notice" is equally good. We must bear in mind that the moment when the term ends is the first stroke of the clock at midnight of the last day. Notice to quit, served on the first day of the second half of any year of a term, to quit on the day following the last day of that half-year, has been held good, on what has been called the "anniversary principle." On the same principle, it seems to me to have been held that a notice to quit served on the last day of the preceding half-year, to quit on the last day of the term is also good —*e.g.*, a notice served on April 30 to quit on October 31, being the last day of a year of the tenancy, though the tenant is not bound to quit until that day ends at midnight. Thus, the moment of quitting under both notices is the same, though one is served on April 30 for October 31, and the other on May 1 to quit on November 1. A three months notice to surrender in the present case, on what I may call the "*mensiversary* principle," would be equally good if served on July 31 to leave on October 31, or if served, as it was, on August 1 to leave on November 1. Whether to surrender or to quit, in each case the party served knows that the tenancy is to terminate on that day three months, either on the last moment of the last day of the term, or on the first moment of the day following. In each case, he gets the period of notice which the terms of the tenancy allow, if he gets the notice on the same day of the month on which it is to operate three months after.

In case the Court should be against him on that point, Mr. Chaytor fell back on the posting of the notice on the 30th. Dropping the notice into the post is not giving it to the party to whom it is addressed. This point has been discussed in Registration cases; but there posting is a statutory method of *effecting service*, and it has been held sufficient when the posting would, in the ordinary course of post, be followed by delivery in due time. But in the present case, postal service is not authorized, and it is found as a fact that the notice did not reach the defendant until August 1st, probably because, being a registered letter, it was not delivered on Sunday.

HOLMES, L.J. :—

It appears from the Case Stated that the questions discussed before the Lord Chief Baron on the hearing of the civil-bill appeal were—(*a*) whether "months" in the agreement of letting between the plaintiff and the defendant mean lunar months? and (*b*) whether assuming that the true construction is "calendar months" a notice of surrender delivered by the plaintiff to the defendant on the 1st August, 1904, intimating the former's intention to surrender on the 1st November following was sufficient to put an end to the letting? If either of these questions ought to be answered in the affirmative, the plaintiff is entitled to recover the sum of £30 sued for in the civil-bill.

At Common Law, followed in this respect by Courts of Equity, "month" in a document is construed as meaning a lunar month, unless the contrary appears from the context. This rule will probably surprise a layman who hears it for the first time, and who knows that where in the ordinary intercourse of life a period of time is measured by months, it would be generally understood that calendar months are intended. But, although the rule has been altered by legislation in the interpretation of statutes, and by custom in the case of some mercantile contracts, it still holds good in the construction of ordinary legal instruments such as the agreement which we are considering in this appeal. The document before us is a letting of certain premises in Dundalk for a term of 500 years from the 1st November, 1902, at the yearly rent of £100, payable half-yearly in advance on the 1st May and the 1st November in each year. It contains no other reference to time save a clause of surrender at the end of the first two years on giving three months' notice beforehand of such intention, and a provision that in case of the death of the lessee, his representatives should be at liberty to surrender the premises within three months after his death.

"Months" here must, I think, be construed under the rule I have mentioned as lunar months, unless I can find evidence of a contrary intention in the agreement taken as a whole; and the evidence relied on for this purpose is that as the letting was for a term of years, and the rent was payable half-yearly, the three months contemplated was the quarter of a year.

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I confess that this reasoning does not seem to me to be quite convincing. The provision is not a general one for determining the tenancy by a six months' notice to quit, or to surrender. In such case, it might be a reasonable inference that the parties meant a half-yearly notice; but here the provision was limited and exceptional, and it is hard to see why we are to substitute a three calendar months' notice for a notice of twelve weeks, which would be the legal construction of the words, taken by themselves. If I were obliged to come to a definite conclusion on this point, I should not do so without a more exhaustive examination of the authorities than I have given them. I have, however, thought this unnecessary, as I entertain no doubt on the other branch of the argument. I am of opinion that a notice to surrender on the 1st November served on the 1st August is good. The term began on the 1st November, 1902. If, instead of being a term of 500 years, it had been a letting from year to year terminable on six calendar months' notice to quit or to surrender, would a notice served on the 1st May to quit on the 1st November following be sufficient? In Furlong's Landlord and Tenant, a work of high authority in this country, we read—"If a yearly tenancy begins on the 1st November, the notice must be served on or before the 1st November to quit on the 1st May following." This is also the law as stated in English text-books, and recognized in many cases. In lettings commencing on Lady Day or Michaelmas, with the rent payable on these days, the half-year's notice to quit or to surrender is a conventional half year, that is to say, a notice from the one feast day to the next; but it is well settled that a notice given on one of them for the following is good. I cannot see why the day of the month on which good service may be made where six calendar months' notice is required, is not also a proper day where the period agreed on is three calendar months. In *Fleury* v. *O'Reilly* (1) it was provided in the agreement of letting that the tenancy could be determined by a week's notice; and it was held that notice given on Monday to quit on the following Monday was good. That decision, although not binding on this

(1) 40 I. L. T. 125.

Court, deserves the respect due to the conclusions arrived at by a very learned and careful Judge; and apart from this it commends itself to my mind as being in strict accordance with analogous authorities. Reliance is placed on the word "beforehand" following the provision for three months' notice; but this does not add to or alter the meaning. What is stipulated for is three months' previous notice.

I have not thought it necessary to consider whether a notice to surrender on the 31st October would be good. Probably it would be so, but there is no doubt that a notice for the 1st November (as this was) would comply with the agreement; and I have given my reasons for holding that service of such a notice on the 1st August would be sufficient.

Solicitor for the plaintiff: *R. Espinasse.*
Solicitor for the defendant: *A. N. Sheridan.*

R. D. M.

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AGENT—*continued.*
were subsequently paid, a small sum for their out-of-pocket expenses in the matter. In June, 1905, defendant consulted a friend *C.* as to the sale of the business. *C.* knew *N.*, and knew he was looking out for a business of the kind, but did not know of his introduction to defendant by plaintiffs. He suggested *N.* to defendant as a likely purchaser, and subsequently communicated with *N.*, advising him to purchase. *N.* inspected the premises and stock, and made an offer, and, after some negotiations between the defendant, *N.*, and a third party, a price was fixed, at which *N.* bought the business. The plaintiffs having brought an action, claiming commission on the purchase-money, the jury found that the sale really and substantially proceeded from the plaintiffs' acts, and found for the plaintiffs for the amount of commission claimed :— *Held*, by the King's Bench Division (Lord O'Brien, L.C.J., and Madden, J.; Wright, J., *diss.*), and by the Court of Appeal, that the verdict in favour of the plaintiffs could not be sustained on the evidence, and that verdict and judgment should be entered for the defendant. *Brandon* v. *Hanna*
[K. B. 212; APP. 227

2. —— *Special or general — Multiplication of acts of special agency—Holding out—Ratification.*] *B.* sold a racehorse to *H.*, a minor, upon a representation by *H.* that his mother would pay. *H.* on former occasions had, to the knowledge of *B.*, purchased horses for which the mother afterwards paid. The mother allowed the son to keep a pack of hounds at her residence, and paid for his equipment as master. She went frequently to races to see her son ride, and was kept informed, when not present, of the results of races in which he engaged. In an action by *B.* against the mother for the price of the horse, it was contended that the conduct of the mother in relation to the son's former purchase transactions, and her acquiescence in his sporting proclivities, constituted the son her general agent for the purchase of horses. The case was tried twice, owing to a disagreement of the jury at the first trial, and in the interval between the trials the mother entered into negotiations with *B.* for

AGENT—*continued.*
the return of the horse—a course which *B.* agreed to accept upon two alternative conditions, which the mother agreed to consider; and this incident was relied upon by *B.* at the second trial as a ratification by the mother of the contract with the son:—*Held*, that the facts proved did not amount to evidence of general agency in the son. *Held*, also, that no multiplication of acts as special agent can convert a special into a general agent, so as to bind a principal in a transaction of this kind. *Foley* v. *Carden* (4 New Ir. Jur. 198) followed. *Held*, also, that the negotiations between the trials were not of such a character as to amount to ratification by the mother. *Barrett* v. *Irvine* [K. B. 462; App. 474

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AUDITOR—*District Council—Labourers Acts—Contracts—Employment of solicitors—Surcharge—Illegal or unfounded payments—The making, or authorising the making, of payments—Negligence or misconduct—Persons accounting—Local Government (Ireland) Act*, 1871, *s.* 12—*Local Government (Ireland) Act*, 1902, *s.* 20.] The Rural District Council of *E.*, who had in hands a scheme for the erection of labourers' cottages under the Labourers Acts, by resolution directed that the council's solicitors should prepare bonds (which included agreements and warrants) for the contractors for the building of cottages and the fencing of plots. In pursuance of this resolution the solicitors did prepare and had duly executed 113 sets of agreements, bonds, and warrants. The agreements were executed on a printed form, which the solicitors had prepared and got printed at their own expense, with blanks left, so as to render the form adaptable to each particular contract. Under former labourers' schemes, when the district of *E.* was under the control of the poor law guardians, a printed form of agreement or contract was used, and the blanks in the forms were customarily filled up by the clerk or his assistant without the aid of the solicitors. The solicitors furnished bills of costs, in which a charge of £2 2*s.* was made for the preparation and execution of these documents, and this sum (which was less than the scale fee) was allowed in each case by a Taxing Master of the High Court, to whom the bills were referred, and before whom the council were represented by an independent solicitor. Thereupon the council paid the solicitors the amount of their bills, including the foregoing items. When the accounts of the council subsequently came to be audited, the auditor disallowed 12*s.* in each case, being the proportion of the £2 2*s.* which he attributed to the preparation of the agreements, upon the ground that the employment of solicitors for the performance of purely clerical duty was unnecessary, and the payment therefor unfounded, and he surcharged the councillors who authorized the employment of the solicitors with these sums, amounting in the aggregate to £67 16*s.*:—*Held*, that there was nothing in the action of the council in employing their solicitors for the work in question to render the payment illegal or unfounded within the meaning of sect. 12 of the Local Government (Ireland) Act, 1871. *Held*, also, that, so far as the councillors, who were merely parties to the resolution authorizing the employment of the solicitors, were concerned, there was no making, or authorizing the making, of a payment within the meaning of sect. 12 of the Local Government (Ireland) Act, 1871. *Held*, also, that the employment of the solicitors was not negligence or misconduct within the meaning of sect. 20 of the Local Government (Ireland) Act, 1902. *Held*, also (*per* Gibson and Kenny, JJ.), that the members who passed the resolution were "persons accounting," within the meaning of sect. 20 of the Local Government (Ireland) Act, 1902. *The King (Kennedy)* v. *Browne* - - - K.B. 505

BANK — Deposit receipt — Whether completed gift or dedication of trust - 416, 428
See Gift.

BANKERS' BOOKS — *Practice—Inspection of bank account—Bankers' Books Evidence Act*, 1879, *ss.* 6, 7 (2).] An application for inspection of the bank account of a person not a party to the action ought not, as a general rule, to be granted without notice to such person and to his bankers, and then only upon an affidavit showing, to the full satisfaction of the Court or Judge, that there are good grounds for believing that there are entries in the account material to some issue to be tried in the action, and which would be evidence at the trial for the party applying for such inspection. *L'Amie* v. *Wilson* - - - - - K.B. 130

BANKRUPTCY—Appeal from Local Court—Costs—Taxation - - - 109
See Taxation of Costs.

—— Debtor's summons — Affidavit — Particulars - - - - - - 151
See Debtor's Summons.

—— Preferential claim—Crown debt - 559
See Crown Debt.

BELFAST—Custom of port—Cargo of Bombay wheat—"Hoisting" or "whipping" - - - - - 578, 602
See Custom of Port.

BRASS—*Dealer in old metals—Purchase of brass under* 56 *lb. weight — Prevention of Crimes Act*, 1871 (34 *&* 35 *Vict. c.* 112), *s.* 13—*General Dealers* (*Ireland*) *Act*, 1903 (3 *Edw.* 7, *c.* 44), *s.* 12.] The provision in section 13 of the Prevention of Crimes Act, 1871, and the schedule to the Act, imposing a penalty on a dealer in old metals who purchases brass in quantities of less than 56 lb. is not repealed by the General Dealers (Ireland) Act, 1903. *Campbell, Appellent*; *Finn, Respondent* K.B. 502

BUILDINGS—Valuation—Principle of assessment - - - - - - 112
See Valuation.

BYSTANDER — Personal injuries to—Negligence of two other parties 437, 438
See Negligence. 1.

CARGO—Discharge of—Custom of port of Belfast—"Hoisting" or "Whipping"
See Custom of Port. [578, 602

CASE STATED—By Justices—Direction to rehear and convict—Procedure—Notice of hearing - - - - - - 18
See Justices. 4.

CASES—*Crawford* v. *Fowke* (6 M. & W. 358) explained - - - - - 537
See Deceit.

—— *Crooks* v. *Gibson* (unreported), followed 129
See Remitting Action to County Court.

—— *Foley* v. *Carden* (4 New Ir. Jur. 198) followed
See Agent. [462, 474

—— *Graham* v. *Wray* (35 Ir. L. T. R. 237) distinguished - - - - - 341
See Security for Costs. 3.

CASES—*continued.*

—— *Hussey* v. *Domvile* (*No.* 2) ([1903] 1 I. R. 265) applied - - - - - - 617
See Covenant to Renew.

—— *R.* (*Herbert*) v. *Kildare* (*Justices of*) ([1895] 2 Ir. 577) considered - - 13
See Justices. 2.

—— *Ward* v. *Dyas* (Ll. & G. *temp.* Sugden, 177) observed upon and distinguished 400
See Succession Duty.

—— *Watson* v. *Porter* ([1907] 2 I. R. 341), referred to by FitzGibbon, L.J. - 555
See Security for Costs. 2.

CAVEATOR—Resident out of the jurisdiction—Security for costs - - - - 1
See Security for Costs. 1.

CHAIRMAN—Meeting for election of conservators - - - - - - 123
See Election of Conservators.

CHARITY—Deposit receipt—Inefficiency as gift or declaration of trust - 416, 428
See Gift.

CHARTER PARTY—Discharge of cargo 578,
See Custom of Port. [602

CLAIM—Parliamentary franchise—Succession—Misdescription—Amendment - 352
See Parliament. 1.

CLOSING—Publichouse—Saturday—Early closing license - - - - - 564
See Early Closing.

COMMENT—Public speech—Pending prosecution
See Contempt. [260

COMMISSION—Principal and agent—Rescission of contract of agency - 212, 227
See Agent. 1.

COMPANY—Railway
See Mails.

COMPENSATION— Workmen's Compensation Act - - - - - - - 104
See Workman.

COMPULSORY PURCHASE—*Housing of the Working Classes Act*, 1890 (53 *&* 54 *Vict. c.* 70), *Schedule II.—Lands Clauses Act*, 1845, *sect.* 124—*Title—Ejectment—Omitted interest.*] The plaintiffs were authorized by a Provisional Order of the Local Government Board, dated 30th April, 1901, and an Act of Parliament confirming same, to take by compulsory purchase certain lands, including those in dispute in this action. The lands required were the fee-simple property of *G.*, and the defendant, who held adjoining lands from *G.* under a lease, encroached upon the lands of *G.*, and had, prior to the date of the plaintiffs' Provisional Order, acquired a title under the Statute of Limitations to portion of the lands required by the plaintiffs, for the residue of the term of his lease. This portion was included in the advertisements issued and the plans deposited by the plaintiffs, under Schedule II. of the Housing of the Working Classes Act, all

COMPULSORY PURCHASE—*continued.*
the provisions of which were duly complied with by the plaintiffs, save that the name of the defendant (of whose claim the plaintiffs were ignorant) did not appear in the schedule to the deposited plans, or in the arbitrator's award, as a person having an interest in the premises, nor was any notice of the publication of the award left at the defendant's premises, or sent by post to him. No claim was ever made by the defendant to the plaintiffs in respect of any interest in the premises. In an action of ejectment brought by the plaintiffs against the defendant, to recover possession of that portion of the lands to which the defendant had so acquired a title:—*Held*, by the Court of Appeal (affirming the decision of the King's Bench Division), that the plaintiffs were not entitled to recover possession. *Omagh Urban Council* v. *Henderson* - K.B. 310; App. 317

COMPUTATION OF TIME—Months
See Surrender. [660, 669

CONSERVATORS—Election of - - 123
See Election of Conservators.

CONTEMPT — *Criminal prosecution — Disagreement of jury — Pending proceeding — Comment in public speech—Newspaper report—Absence of danger of prejudicial interference with future trial—Costs.*] Upon the trial of *D.* and others for unlawful assembly at Winter Assizes the jury disagreed, and the traversers were bound over to attend and take their trial at the ensuing Spring Assizes. In a speech at a public meeting, delivered after the disagreement of the jury, *L.*, a former Chief Secretary for Ireland and Member of Parliament, made some references to the trial and its result, which were reported without comment in the *Irish Times* and *Daily Express* newspapers of the following morning. He related the facts as disclosed at the trial, and, in effect, he conveyed that the disagreement of the jury was a miscarriage of justice. The speech was, by means of a question in the House of Commons, brought under the notice of the Attorney-General, who said that, in his opinion, the language used would not have any effect upon the jurors at the second trial, and he did not propose to take any action. Upon an application to commit *L.* and the representatives of the newspapers for contempt, *L.*'s defence was that the speech was a political one, and his object was to show that the action of the jury was neither surprising nor unreasonable, having regard to the way in which acts of unlawful assembly and boycotting were minimised in the House of Commons by the Chief Secretary of the day. He in no way suggested or assumed the guilt of the traversers, and he had not present to his mind the possibility of the case being tried again. He added that, if he had said anything which could be considered as calculated in the very slightest degree to prejudice

CONTEMPT—*continued.*
any further trial of the case, nothing was further from his mind. He further asserted that the application was a mere political move, and not for the redress of any real or *bona fide* grievance: —*Held*, by the Court (Lord O'Brien, L.C.J., and Madden and Kenny, JJ.; Palles, C.B., *diss.*), that, as nothing that was said or done was really calculated to prejudice the fair trial of the accused, the application should be refused, but without costs, as a reference had been made to a trial which was still pending. *Per* Lord O'Brien, L.C.J.: The action of the Attorney-General should not be the ground of the decision of the Court, but ought to suggest very great caution in dealing with the matter. *Per* Palles, C.B.: While concurring with the majority of the Court as to the representatives of the Press, the contempt by *L.* required the imposition of a substantial pecuniary penalty. *The King* v. *Dolan* K. B. 260

CONTINUING PROCEEDINGS — *County Court—Decree—Civil-bill appeal—Death of plaintiff (respondent) after notice of appeal—45 & 46 Vict. c. 29, s. 4—Practice—Jurisdiction.*] Where, after an appeal from a decree of the County Court Judge to the Judge of Assize, under 45 & 46 Vict. c. 29, s. 4, the appellant or respondent dies after notice of appeal, but before the hearing, there is jurisdiction in the Judge of Assize to adjourn the appeal to enable a personal representative of the deceased to be added to the record, and, upon this being done, there is jurisdiction to hear and determine the appeal. *Canning* v. *Farren* K. B. 486

CONTRACT—Agent—Special or general—Ratification - - - - 462, 474
See Agent. 2.

—— Engineering works—Incorporation of plans and specifications — Proviso that party making tender should verify representations made—Whether a protection against reckless misrepresentations 27, 82, 537
See Deceit.

—— Rescission—Principal and agent 212, 227
See Agent. 1.

CONTRIBUTORY NEGLIGENCE—*Finding that the defendants could, by ordinary care, have avoided the consequence of the plaintiff's negligence —Proper questions to be left to the jury.*] In an action for damages for personal injuries, in which the negligence complained of was the placing of a heap of stones on the highway, whereby the plaintiff was thrown out of his pony-trap, the jury found that the defendants had been guilty of negligence; that the plaintiff had been guilty of negligence; that the defendants could have, by the exercise of ordinary care, avoided the consequence of the plaintiff's negligence:—*Held*, that the finding was one of contributory negligence, and that the verdict should have been entered for

CONTRIBUTORY NEGLIGENCE — *continued.*
the defendants. The questions to be left to the jury in cases of contributory negligence discussed. *Butterley* v. *Mayor, Aldermen, and Burgesses of Drogheda* - - - K. B. 134; APP. 150
—— Material issue where injury to third party is caused by joint negligence of others
See NEGLIGENCE. 1. [437, 448
CONVICTION—Alternative statement of offence
See JUSTICES. 1. [386
—— Negativing exception - - - 5
See JUSTICES. 5.
—— Penalty including costs — Small Penalties Act, 1873 - - - - 13, 18
See JUSTICES. 2, 3.
—— Two convictions for same transaction—Selling and keeping open for sale during prohibited hours - - - 564
See JUSTICES. 7.
COSTS—Appeal from Local Bankruptcy Court—Taxation - - - - - 109
See TAXATION OF COSTS.
—— Penalty including — Imprisonment till payment—Small Penalties Act, 1873 13, 18
See JUSTICES. 2, 3.
—— Security for — Defendant caveator resident out of the jurisdiction - - 1
See SECURITY FOR COSTS. 1.
—— Security for—Plaintiff resident in England
See SECURITY FOR COSTS. 2, 3. [341, 555
—— Taxation.
See TAXATION OF COSTS.
COUNTY COURT—Appeal—Death of party
See CONTINUING PROCEEDINGS. [486

COVENANT TO RENEW—*Lease for three lives renewable within a limited period, on tenant nominating a new life on the dropping of each life successively — Nominations — Renewal — Evidence — Declarations against interest*—Omnia praesumuntur rite fuisse acta.] A lease for three lives, dated 1st August, 1811, contained a covenant that the lessor, upon the death of the lives or life within a term of seventy years, and on the nomination by the lessee of the life of any other person to be inserted in the place of the person happening first to die, would, on demand and on payment or tender of one peppercorn, if demanded, add to the time and term of the lease the life of such person so nominated, which life was to be endorsed on the lease, or to be written in a deed, label, or parchment, to be affixed to the lease for that purpose, or in a separate deed or writing, declaring the life so failing and the life so added in lieu thereof, and the three lives in being, during which the estate should be then continued: and in like manner, from time to time successively thereafter during the term, upon the failure of every other life in the lease then nominated and thereafter to be successively nominated, and upon the like nomination of any other life successively in lieu of every several life so failing, that the lessor, upon like demand, and upon like payment or tender, would successively thereafter add and insert to the time and term of the lease the several life or lives of the several person or persons so successively nominated in the place and stead of the several person or persons so successively happening to die, which several lives so to be added and inserted were to be endorsed with declarations, as in the case of the failing of the first life. An admittedly valid renewal of the lease was made on the 21st December, 1852, for the lives of the Prince Consort, Sir Maziere Brady, and Sir Francis Blackburne. The Prince Consort died on the 14th December, 1861, and there was in existence an unexecuted engrossment of renewal, dated the 16th day of July, 1864, in which the life of Nicholas Ball was substituted; but at the date of the next *executed* renewal, viz. 20th March 1872, all the lives in the last previous *executed* renewal, and all the lives in the unexecuted engrossment, had failed. The last-mentioned renewal, which was executed by the tenant for life of the reversion, recited that the lease of the 1st August, 1811, had been several times renewed, and the last two renewals thereof bore date the 21st December, 1852, and the 16th July, 1864 (the unexecuted engrossment), the deaths of the three lives in the latter instrument, and that the lessee, "in order to supply and fill up the three lives according to the intent and meaning of the said recited indenture of lease of the 1st day of August, 1811, and to preserve and continue the estate in and by the said indenture granted, pursuant to the covenant for renewal therein contained, has nominated the lives of the Right Hon. John, Earl Russell, John Douglas Sutherland, Marquis of Lorne, eldest son of the Duke of Argyll, and his Royal Highness Prince Albert Victor Christian Edward, eldest son of his Royal Highness Albert Edward, Prince of Wales, to be added to the time and term of the recited indenture of lease in the place and stead of" the lives that had failed. Nicholas Ball died on the 15th January, 1865, and there was no direct evidence that a life was nominated upon his death; but after the death of Francis Blackburne, on the 17th September, 1867, a draft renewal was produced, dated 1869, in which the names of the Earl of Derby and Earl Russell were substituted for those of Nicholas Ball and Francis Blackburne. The Earl of Derby died on the 28th October, 1869, and a second draft renewal was produced, in which the Marquis of Lorne was substituted for him. Sir Maziere Brady died before the renewal was executed, and accordingly, when the formal renewal came to be executed on the 20th March, 1872, the lives inserted

COVENANT TO RENEW—*continued.*
were those of Earl Russell, the Marquis of Lorne, and Prince Albert Victor; but no reference was made to intermediate nominations. A further renewal, which contained similar recitals, was made on the 30th April, 1879, upon the death of Earl Russell, and it was admitted that its validity could not be questioned if the previous renewal of 1872 was regular. The tenant for life of the reversion, who had been in possession during the period in question, viz., from 1857 to 1891, died on the 22nd July, 1891, and the plaintiffs, who were entitled as tenants in tail, instituted this action of ejectment against the lessees and their under-tenants, contending that, by reason of failure to nominate lives successively, the renewal of 1872 was invalid, and the lease of 1811 at an end. The jury at the trial found as a fact that a new life was nominated from time to time by the lessee for the time being on the fall of each life down to the execution of the renewal of 1879:—*Held*, that, upon the true construction of the covenant, it prescribed as necessary for obtaining a renewal that the lessee should regularly nominate a life within a reasonable time from the fall of each life, so as always to maintain the full number of three lives. *Hussey* v. *Domvile* (No. 2) ([1903] 1 I. R. 265) applied. *Held*, also, that a formal renewal was not necessary to preserve the lease, if the nominations had been duly made. *Held*, also, that upon production of the renewal of 1872, the onus of proving that the lives had not been regularly nominated lay upon the party alleging it. *Held*, also, that the recitals in the renewals of 1872 and 1879, executed by the tenant for life of the reversion, who would have gained materially by the determination of the lease, were declarations upon a subject-matter of which she had special knowledge, and were evidence to support the finding of the jury. *Hussey* v. *Domvile*
[K. B. 617

CRIMINAL LAW—Pending proceeding—Disagreement of jury—Comment—Contempt
See CONTEMPT. [260

—— Selling intoxicating liquor during prohibited hours— Opening for sale—Two convictions in respect of same transaction 564
See JUSTICES. 7.

—— Summons — Conviction — Negativing exception. - - - - - - 5
See JUSTICES. 5.

—— Summons—Service in non-adjoining county
See JUSTICES. 6. [160

CROWN DEBT — *Bankruptcy — Liquidated damages in respect of rent of telephone—Preferential claim.*] The bankrupt had rented a telephone service-wire from the Postmaster-General, under an agreement dated 2nd June, 1905, which contained a provision that if he should become

CROWN DEBT—*continued.*
bankrupt the Postmaster-General might terminate the agreement by notice in writing, and that in doing so the Postmaster-General should be entitled to recover forthwith, as liquidated damages and not by way of penalty, a sum equal to the whole subscription which would become payable between such termination and the expiration of the agreement. The adjudication took place on the 15th October, 1906, and notice of the termination of the agreement was served on the 14th November, 1906:—*Held*, that the Postmaster-General was entitled to, as a preferential Crown debt, the amount he claimed as liquidated damages in respect of the rent of the telephone up to the 18th of June, 1908. *In re Niblock* - K. B. (BANKCY.) 559

CUSTOM OF PORT—*Ship—Discharge—Port of Belfast—Average rate of discharge—"Whipping" or "hoisting"—Cargo of wheat in bags.*] The plaintiffs' steamship, the "Aboukir," loaded with a cargo of Bombay wheat in bags, arrived in Belfast on Thursday, 28th December. The defendant was the endorsee of the bill of lading, which contained a provision that if the consignee did not take delivery of the goods as soon as the steamship was ready to discharge, they should be landed and warehoused at the expense of the owner of the goods. The discharge of this cargo commenced on Friday, 29th December. For four days, up to Tuesday night, the cargo was discharged by whipping—a process by which one bag at a time is hoisted from the hold by the ship's tackles to a point above a weighing-machine, placed at the height of a man's shoulder on an elevated staging on the deck near the hatch. It is then, when weighed, taken by the merchant's stevedore. The plaintiffs having complained to their agent of the slowness of the discharge, and insisting that the cargo should be hurried out at top speed, the plaintiffs' agent informed the defendant's stevedore that he would discharge the rest of the cargo by hoisting—a process by which five bags at a time were raised from the hold of the vessel, and placed on the deck, from which they were trucked to the weigh-bridge, which in the case of discharge by hoisting, is only a few inches above the deck. The defendant refused to take delivery by hoisting, or to accept delivery from the ship's rail of bags so hoisted, and the remainder of the cargo was discharged by the plaintiffs' men into a warehouse. An action having been brought by plaintiffs to cover the cost of landing and warehousing this part of the cargo, the defendant relied upon two alleged customs of the port of Belfast—(*a*) that a steamer of the burden of the "Aboukir," laden with grain, should be discharged at the average rate of not less than 500 tons per day, which defendant contended meant not more than 500 tons per day; and (*b*) that cargoes of Bombay

CUSTOM OF PORT—*continued.*
wheat in bags should be discharged by whipping:—*Held*, by the King's Bench Division (Palles, C.B., and Kenny, J.), that neither of the alleged customs was binding on the shipowners; that the defendant had been guilty of breach of his contract to accept delivery with reasonable despatch, and that the plaintiffs were consequently entitled to recover, as damages, the cost of landing and warehousing the portion of the cargo in question:—*Held*, by Madden, J. (who, however, did not differ from the other members of the Court on any question of law), that, upon the facts proved whipping was, though not legally binding as a custom, a reasonable mode of discharge adopted by both parties; that the defendant was guilty of no default in taking delivery; and that judgment should be for the defendant. *Held*, by the Court of Appeal (the alleged custom as to average rate of discharge having been abandoned by defendant), that the alleged custom of whipping, even if there was sufficient evidence to prove it, was unreasonable, and that plaintiffs were entitled to the damages in question. *Clydesdale Shipowners Company* v. *Gallagher* - K. B. 578; App. 602

DEALER—Old metals—Brass—34 & 35 Vict. c. 112, s. 13—3 Edw. 7, c. 44, s. 12 502
See Brass.

DEATH—Of party to civil-bill appeal - 486
See Continuing Proceedings.

DEBENTURES — Gasworks constructed by Town Commissioners—Equitable execution - - - - - - 235
See Receiver.

DEBTOR'S SUMMONS—*Bankruptcy—Liquidated debt—Particulars of demand — Affidavit in prescribed form.*] In proceeding by a debtor's summons, the form of the summons and the affidavit in support, as prescribed by the rules, should be strictly followed. Where the indorsement on the debtor's summons stated the amount due to be £10,000 for money had and received by the debtor for the use of the creditor between the 20th October, 1900, and the 19th October, 1906, and the affidavit in support omitted to state that an account of the particulars had been given to the debtor, and payment had been demanded:—*Held*, that the proceedings were not in compliance with the rules, and that the debtor's summons should be dismissed. *In re Moore* - - - App. 151

DECEIT—*Contract—Representations made without real knowledge or belief—Representations not intended to be solely acted on—Provision as to verification by contractor of matters which could influence tender—Damage resulting from fraudulent misrepresentation — Reckless negligence in statement amounting to deceit—Public Authorities Protection Act*, 1893.] Plaintiffs contracted to execute certain sewage outfall works for the Dublin Corporation.

DECEIT—*continued.*
In the contract plaintiffs covenanted to execute the works described in the drawings and specification according to the drawings, specification, conditions, and bill of quantities, and the Corporation covenanted to pay for the works on the receipt of the certificate in writing of their engineer, as provided by the conditions. The specification provided, among other things—(4) That the drawings and specification were to be considered explanatory of each other, and any discrepancies should be explained by the engineer; (5) that the contractor should sink trial-holes, &c., and set out and keep correct the works; (38) provisions as to the engineer's certificate of completion; (39) that all disputes as to the works, the construction of the contract, &c., were to be referred to the engineer, whose decision should be final, other differences to be referred to arbitration; (43) that the contractor was to satisfy himself as to the levels, character, and nature of all existing works, &c., of the nature of the strata, &c., and was to obtain his own information on all matters which could in any way influence his tender; no charge for extra work, or otherwise, was to be allowed in consequence of any incorrect information or inaccuracies in the drawings, specification, or estimate of quantities; (46) the contractor was to verify for himself the particulars of existing matters shown on the drawings; (48) that the information given as to existing walls, &c., was given as the best in the possession of the Corporation, but the Corporation did not hold itself in any way responsible for its accuracy. When the works were completed, plaintiffs claimed a sum of £36,574 from the Corporation, on the grounds—(1) that the plans showed a certain existing wall, extending 9 feet below the Ordnance datum line, which could be utilised for the purposes of the works; that this wall did not exist as shown, and that consequently the plans for the works had been altered, and plaintiffs, at the direction of the engineer, had completed the works at this extra cost; (2) that the Corporation had fraudulently misrepresented the structure and existence of this wall, and had thereby induced plaintiffs to enter into the contract, to their detriment. As to the counts in contract, the Corporation relied on the absence of a certificate from their engineer, and as to the count in deceit, they relied on the conditions of the specification, and denied the making of any representation and any fraud. They further pleaded that the action was not brought within the time limited by the Public Authorities Protection Act, 1893. Plaintiffs replied that the certificate was withheld by the engineer fraudulently and in collusion with the defendants. As to this, the Corporation rejoined, denying fraud and collusion, and relying on clause 38 of the specification: and no evidence to sustain the reply

DECEIT—*continued.*
was offered at the trial:—*Held*, that the claim on contract must fail in the absence of a certificate. *Held*, also, that the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), did not apply. *Held*, also, by the Court of Appeal (reversing the judgment of the King's Bench Division, from which Lord O'Brien, L.C.J., dissented), that clauses 4 and 43 of the specification showed that the representations were not intended to be acted on, and that consequently (there being no wilful misrepresentation) there was no fraud. On appeal by the plaintiffs to the House of Lords the order of the Court of Appeal was reversed, and the order of the King's Bench Division was restored. *Pearson & Son, Limited*, v. *Lord Mayor, Aldermen, and Burgesses of the City of Dublin*
[K. B. 27; App. 82; H. L. 537

DECLARATION OF TRUST—Deposit receipt—Charity - - - 416, 428
See Gift.

DEMAND—Carriage of mails — Postmaster-General—Railway Company - 242
See Mails.

DEPOSIT RECEIPT — Inefficacy as gift or declaration of trust - - 416, 428
See Gift.

DESCRIPTION—Succession claim—Change of residence—Amendment - - 352
See Parliament. 1.

DESCRIPTIVE PARTICULARS — Sale of leasehold—Alleged extension of term—Repudiation by lessor—Suppression
See Fraud [355, 379

DISAGREEMENT—Of jury—Pending prosecution—Public speech—Contempt 260
See Contempt.

DISCOVERY—Bankers' Books Evidence Act, 1879—Practice - - - 130
See Bankers' Books.

DRAWINGS — Incorporated with engineering contract — Reckless misrepresentation — Proviso as to verification by party making tender - - - - - 27, 82
See Deceit.

DWELLINGHOUSE—Service franchise 345
See Parliament. 2.

EARLY CLOSING — *Licensing law — Time for closing on Saturday nights — Licensing (Ireland) Act*, 1874 (37 & 38 *Vict. c.* 69), *s.* 2—*Intoxicating Liquors (Ireland) Act*, 1906 (6 *Edw.* 7, *c.* 39), *s.* 2.] Since the coming into operation of the Intoxicating Liquors (Ireland) Act, 1906, the holder of an early-closing license must close his premises on Saturdays at 9 p.m. in the case of towns the population of which exceeds 5000:—So *held*, by Lord O'Brien, L.C.J., and Andrews and Wright, JJ.; Palles, C.B., and Madden, J., *diss.* *Dorrian, Appellant*: *M'Hugh, Respondent* - - - K. B. 564

ELECTION OF CONSERVATORS—*Fisheries — Electoral Division — Meeting — Chairman — Proxies — Fisheries (Ireland) Act*, 1848 (11 & 12 *Vict. c.* 92), *ss.* 3, 11, 12.] The chairman of a meeting, called under the Fisheries (Ireland) Act, 1848 (11 & 12 Vict. c. 92), ss. 11, 12, for the purpose of electing the appointed number of persons as conservators for an electoral division, must be selected from amongst the electors present who have paid their license duty for the current year. Two electoral divisions cannot form a consolidated constituency. The voting for conservators for each electoral division must be confined to the votes representing that division. *The King (Robertson)* v. *O'Donnell* - - - K. B. 123

EMPLOYMENT — Accident to workman, whether arising out of - - 104
See Workman.

EQUITABLE EXECUTION — Debentures—Gasworks - - - - - 235
See Receiver.

ESTOPPEL—Principal and agent 212, 227
See Agent. 1.

—— Representations — Insurance of motor car pending repairs - - 328, 339
See Negligence. 2.

EVIDENCE — Agency — Special or general — Holding out — Multiplication of acts of special agency - - 462, 474
See Agent. 2.

—— Discovery—Inspection of bank account 130
See Bankers' Books.

—— Estoppel.
See Estoppel.

—— Letting value—Expenses of repairs, insurance, and up-keep - - - 112
See Valuation.

—— Nomination of lives—Lease renewable within limited period - - - - 617
See Covenant to Renew.

—— Proper to be submitted to jury 27, 82, 134, 150, 355, 379, 537
See Contributory Negligence.
Deceit.
Fraud.

EXCEPTION—Statutory offence—Negativing 5
See Justices. 5.

EXECUTION—Equitable - - - 235
See Receiver.

EXECUTION OF WILL — Attestation—Position of witnesses' signatures - 480
See Attestation of Will.

EXECUTOR — *Will — Two paper writings — Probate — Grant to executors named in the two instruments—Practice.*] Where probate was granted of two testamentary papers, as together constituting the last will of a testator, the grant was made to the two executors named in the first instrument and one executor named in the second instrument,

EXECUTOR—*continued.*
the second executor named in the latter document having renounced. *In the Goods of Strahan*
[K. B. (PROB.) 484

FISHERY ACTS—Gaff—Negativing exception—Summons—Conviction - 5
See JUSTICES. 5.

FRANCHISE—Parliamentary - 345, 352
See PARLIAMENT. 1, 2.

FRAUD—*Sale of leasehold premises—Descriptive particulars—Promise of extended term—Repudiation by lessor—Knowledge of vendor before completion—Fraudulent suppression of material fact—Evidence proper to be submitted to a jury.*] Upon the sale of a licensed publichouse, held for the residue of a term of years, of which twenty-five years were unexpired, at a yearly rent of £40, the descriptive particulars stated that a resolution was passed by a board of guardians, who were the landlords, for the grant of a lease for 500 years to the vendor, at a rent of £50 a year, subject to certain conditions as to building. After the purchase the purchaser discovered, for the first time, that prior to completion the guardians had repudiated the resolution, and had recommended the Local Government Board to refuse their sanction to the lease. In an action for damages for fraudulent suppression by the vendor of the repudiation, evidence was given—contradicted, however, by the vendor—that the vendor was at the board's place of meeting the day when the resolution granting the new lease was repudiated; that his solicitor afterwards applied to the board for a copy of the original resolution, and to return draft agreements, and was refused; and that the vendor offered the purchaser £100 for his bargain:—*Held*, by the King's Bench Division and by the Court of Appeal, that this was evidence of fraud on the part of the vendor proper to be submitted to the jury; and that, upon their disagreement, the vendor was not entitled to have a verdict and judgment entered for him. *Kelly* v. *Doyle*
[K. B. 355; APP. 379

—— Reckless misstatement—Public Authorities Protection Act - - - 27, 82, 537
See DECEIT.

GAFF—Prosecution for using—Negativing statutory exception - - - 5
See JUSTICES. 5.

GENERAL DEALER—Brass—34 & 35 Vict. c. 112, s. 13 - - - - 502
See BRASS.

GIFT—*Incompleteness—Intended transfer of money—Deposit receipt of money in bank—Invalid declaration of trust—Charity.*] *O.*, who was parish priest of *B.* in the county of Kerry, on the 15th June, 1905, lodged a sum of £60 for Masses on deposit receipt in the branch of the National Bank at Killarney. The deposit receipt was in the form—

GIFT—*continued.*
"Received from the parish priest of Barraduff the sum of £60 for Masses, to be accounted for at our office here." On the same day he lodged on deposit receipt in the same bank in a similar form a sum of £50 for the parish priest of *B.*, for repairs and building to church. On the same day he also lodged two sums of £385 each in the joint names of himself and each of two nieces. This was done in consequence of a conversation with the bank manager, during which *O.* stated that he wished to give the two sums of £50 and £60 for the purposes mentioned; but he did not wish to make a will. Two days after *O.* drew out the £50 lodged on deposit receipt for repairs to the church, and placed the amount to the credit of his current account. On the 21st September, 1905, *O.* lodged a sum of £100 on deposit receipt in the same bank for the parish priest of *B.*, for repairs and building to church. This was done in consequence of a conversation with the bank manager, at which two other persons were present, in which *O.* stated that he desired to leave this sum of money to his successor for repairs to the church. This £100 was made up by taking £50 from each of the deposit receipts in favour of the nieces. *O.* died on the 15th November, 1905:—*Held*, by the King's Bench Division, that the gift of £60 for Masses and £100 for repairs of the church were good charitable gifts, and that the successor of *O.* as parish priest of *B.* was entitled to the amount. *Held*, by the Court of Appeal (reversing the decision of the King's Bench Division), that, as the money on deposit receipt remained in the possession and under the control of *O.* during his life, the relationship of the bank and *O.* was that of debtor and creditor, and that a valid trust had not been created. *O'Flaherty* v. *Browne*
[K. B. 416; APP. 428

HOUSING OF THE WORKING CLASSES ACT—Omitted interest - 310, 317
See COMPULSORY PURCHASE.

INCOMPLETENESS—Gift - 416, 428
See GIFT.

INSPECTION—Bank account of stranger to action—Notice - - - 130
See BANKERS' BOOKS.

JUDGMENT—Equitable execution - 235
See RECEIVER.

JURISDICTION—Judge of Assize—Civil-bill appeal—Death of party - - 486
See CONTINUING PROCEEDINGS.

—— Justices—Service of summons in another not adjoining county - - - 160
See JUSTICES. 6.

JURY—Disagreement—Pending prosecution—Comment—Contempt - - 260
See CONTEMPT.

JURY—*continued.*

—— Evidence proper to be submitted to [27, 82, 134, 150, 355, 379, 537

See CONTRIBUTORY NEGLIGENCE.
DECEIT.
FRAUD.

—— Findings of—Action for negligence—Questions to be submitted - - 134, 150

See CONTRIBUTORY NEGLIGENCE.

—— Findings of—Construction—Injury to bystander by negligence of two other parties

See NEGLIGENCE. 1. [437, 448

JUSTICES—*Conviction—Distinct offences charged—Defendant convicted generally—Alternative statement of offence—27 Geo. 3 (Ir.), c. 35, ss. 10, 11.*] *M.* was charged on summons for that, without being duly authorized, he did go and enter upon the lands of the complainant, provided with a gun, to look for, set, spring, start, follow, shoot, course, hunt, or otherwise pursue, take, or destroy, game, contrary to 27 Geo. 3, c. 35, ss. 10, 11. An order was made by the Justices, "defendant duly convicted and ordered to pay," &c. *Held*, that the conviction was bad, inasmuch as several distinct offences were charged, and it did not appear of which the defendant was convicted. *The King* (*M'Carron*) v. *Justices of Co. Donegal* K. B. 386

2. —— *Conviction—"Penalties, including costs"—Small Penalties (Ireland) Act*, 1873 (36 & 37 *Vict. c.* 82), *ss.* 3, 4, 6.] The word "penalty" in section 4 of the Small Penalties (Ireland) Act, 1873, means the aggregate amount of the penalty, strictly so called, and the costs. At least, *per* Lord O'Brien, L.C.J., where the incorporation of costs with the penalty, strictly so called, does not produce an aggregate sum exceeding £5. *R.* was summarily convicted by Justices at Petty Sessions, and ordered to pay, for fine, £3, and, for costs, 5*s.* 5*d.*, or, in default of payment, to be imprisoned for two months, unless said sums sooner paid:—*Held*, that the conviction was good. *The Queen* (*Herbert*) v. *Justices of Kildare* ([1895] 2 I. R. 577) considered. *The King* (*Robinson*) v. *Justices of Counties Wicklow and Dublin* - - - - - - K. B. 13

3. —— *Conviction—"Penalties, including costs"—Small Penalties (Ireland) Act*, 1873 (36 & 37 *Vict. c.* 82), *ss.* 3, 4, 6.] The word "penalty" in section 4 of the Small Penalties (Ireland) Act, 1873, means the aggregate amount of the penalty, strictly so called, and the costs. At least, *per* Lord O'Brien, L.C.J., where the incorporation of costs with the penalty, strictly so called, does not produce an aggregate sum exceeding £5. *H.* was summarily convicted by Justices at Petty Sessions, and ordered to pay, for fine, 10*s.*, and, for costs, 1*s.* 6*d.*, or, in default of payment, to be imprisoned for seven days, unless said sum sooner paid:—*Held*, that the conviction was good. *The King* (*Hastings*) v. *Justices of County Galway* - - - - K. B. 18

JUSTICES—*continued.*

4. —— *Re-hearing—Direction on case stated—Procedure.*] On a case stated by Justices, the Court adjudged that the Justices were wrong in point of law in dismissing the complaint, and that they should re-hear and convict the defendant. Thereupon the complainant served the order on both Justices and defendant, and served notice on the defendant that an application would, on a particular day, be made to the Justices to re-hear the complaint:—*Held*, that such services were sufficient to bring the defendant again before the Justices, and that a conviction following thereon was good. *The King* (*Hastings*) v. *Justices of County Galway* - - - - - - K. B. 18

5. —— *Conviction—Summons—Negativing exceptions—Using gaff to take fish except as auxiliary to angling, or for purpose of removing fish from a legal weir or box—13 & 14 Vict. c.* 88, *s.* 40—*County Officers and Courts* (*Ireland*) *Acts*, 1877 (40 & 41 *Vict. c.* 56), *s.* 78.] 13 & 14 Vict. c. 88, s. 40, enacts that it shall not be lawful, in any fresh-water river or lake, to use, for the purpose of taking fish, any gaff (except when used solely as auxiliary to angling with rod and line, or for the purpose of removing fish from any legal weir or box by the owner or occupier thereof). *S.* was charged on summons with having used a gaff in a fresh-water river for the purpose of taking fish, and convicted by the Justices at Petty Sessions. *Held*, that the conviction was good, although neither the summons nor the conviction negatived that the use was for a purpose excepted by the section. *Per* Gibson, J.: The test to determine whether section 78 of 40 & 41 Vict. c. 56 applies so as to render it unnecessary in a summons to negative exceptions in a statute is, that where a statute makes an act an offence, subject to particular exceptions, &c., which, when applicable, make the *prima facie* offence an innocent act, such exceptions need not be negatived. But where a statute makes an act, *prima facie* innocent, an offence when done under certain conditions, words of exception may constitute the gist of the offence, and, in such case, must be negatived. *The King* (*Sheahan*) v. *Justices of County Cork* - - - - - - K. B. 5

6. —— *Summons—Service in another county, not being an adjoining county—Petty Sessions* (*Ireland*) *Act*, 1851 (14 & 15 *Vict. c.* 93, *sect.* 11.] Where a summons is issued by a Justice of a county in which an offence punishable on summary conviction has occurred, requiring a defendant to appear and answer to a complaint in respect of such offence, there is no jurisdiction, under the Petty Sessions (Ireland) Act, 1851, to serve the summons in another county, not being an adjoining county, so as to enable the Justices of the county in which the offence occurred to hear and determine the case in the absence of the defendant. *Great Southern and*

JUSTICES—*continued.*
Western Railway Co., Appellants; *Leyden, Respondent* - - - - - - - K. B. 160
7. —— *Two convictions in respect of same transaction.*] A person convicted of selling intoxicating liquor during prohibited hours cannot also be convicted of opening for sale during prohibited hours, the selling and opening being part of the same transaction on one and the same occasion. *Dorrian, Appellant; M'Hugh, Respondent* - K. B. 564
—— Licensing
See LICENSING ACTS.
—— Repair of road undertaken by Urban District Council—Order—Limit of time—Definiteness - - - - - - 389
See URBAN DISTRICT COUNCIL.
LABOURERS ACTS—District Council—Contracts—Employment of solicitors—Audit—Surcharge - - - - - 505
See AUDITOR.
LANDLORD AND TENANT—Lease
See LEASE.
—— Publichouse—Eviction—Grant of license to landlord—Application by evicted tenant for license in vicinity - - 299, 309
See LICENSING ACTS. 1.
—— Publichouse—Surrender of part - 474
See LICENSING ACTS. 2.
LANDS CLAUSES ACT—Omitted interest
See COMPULSORY PURCHASE. [310, 317
LEASE—Covenant to renew—Limited period for renewal—Nomination of lives—Evidence
See COVENANT TO RENEW. [617
——Sale—Promise of extended term—Repudiation by lessors—Fraudulent suppression 355,
See FRAUD. [379
—— Surrender—Notice—Months, whether lunar or calendar - - - - 660, 669
See SURRENDER.
LICENSING ACTS—*Eviction of licensed premises — License granted to landlord — Subsequent application by tenant for license for premises in vicinity — Licensing (Ireland) Act*, 1902 (2 *Edw.* 7 *c.* 18), *s.* 3.] *A* was yearly tenant to *B* of certain licensed premises, the premises having been licensed before the creation of the tenancy. *A*'s tenancy was determined by notice to quit, and he was evicted, and possession obtained by *B*. *B* applied for and obtained a new license for the premises. *A* subsequently applied, under sect. 3 of the Licensing (Ireland) Act, 1902, for a new license for premises which he had taken in the immediate vicinity :—*Held*, by the King's Bench Division and the Court of Appeal, that there was no jurisdiction to grant such a license to *A*. *The King* (*Supple*) v. *Chairman and Justices of Co. Clare* - - - - - K. B. 299; APP. 309
2. —— *New license for premises forming portion of premises licensed at passing of Act—Licensing (Ireland) Act*, 1902 (2 *Edw.* 7, *c.* 18), *s.* 2, *sub-s.* 1.] At the time of the passing of the Licensing (Ireland) Act, 1902, and up to the year 1905, *J.* held a publican's license in respect of two adjoining houses, both houses being included in the one license. One of these houses was held by *J.* as tenant of *N.* In 1905 *J.* surrendered this house to *N.*, and obtained a renewal of the license in respect of the other house. *N.* having subsequently applied for a certificate for a new license in respect of the house surrendered to him :—*Held*, that there was no jurisdiction to grant such certificate. *The King* (*Croghan*) v. *Chairman and Justices of Co. Mayo* - - - - - - K. B. 474
—— Early closing license—Time for closing on Saturday—6 Edw. 7, c. 39, s. 2 564
See EARLY CLOSING.
LIMITED ADMINISTRATION—Trust property—Practice - - - - 209
See ADMINISTRATION.
LIVES—Nomination of—Evidence - 617
See COVENANT TO RENEW.
LOCAL BANKRUPTCY COURT—Appeal—Costs—Taxation - - - - 109
See TAXATION OF COSTS.
LOCAL GOVERNMENT — Auditor—Powers and duties of—Surcharge—Employment of solicitors—Contracts under Labourers Acts - - - - - - 505
See AUDITOR.
—— Urban District Council—Transfer of powers
See URBAN DISTRICT COUNCIL. [389
MAILS—*Carriage of mails—Post Office—Railway Company—Demand of Postmaster-General—Mail trains—Hours and times—Conveyance of Mails Act*, 1838 (1 & 2 *Vict. c.* 98), *s.* 1—*Railways Regulation Act*, 1844 (7 & 8 *Vict. c.* 85), *s.* 11.] The Postmaster-General, who is empowered by the Conveyance of Mails Act, 1838, upon service of a twenty-eight days' notice, to require the conveyance and forwarding of the mails by a Railway Company "at such hours or times in the day or night" as he should direct, is not restricted to the naming of fixed and definite hours for the departure and running of mail trains, but is entitled to name variable times, by making the departure and running of the mail trains dependent on the time of the arrival of the mails in ordinary course of through transit by rail or sea. *The King* (*Postmaster-General*) v. *Great Northern* (*Ireland*) *Railway Co.* - - - - - - K.B. 242
MARRIAGE PORTION—Settlor—Succession duty - - - - - - 400
See SUCCESSION DUTY.
MASTER AND SERVANT—Service franchise
See PARLIAMENT. 2. [345
—— Workmen's Compensation Act, 1897 104
See WORKMAN.

METALS—General dealer—Brass - - 502
See BRASS.

MISDESCRIPTION — Succession claim — Amendment - - - - - 352
See PARLIAMENT. 1.

MISREPRESENTATION — Fraudulent — Reckless misstatement - 27, 82, 537
See DECEIT.

MONTHS—Whether lunar or calendar 660, 669
See SURRENDER.

MOTOR CAR — Insurance — Representations—Negligence - - - - 328, 339
See NEGLIGENCE. 2.

NEGLIGENCE—*Personal injuries—Accident to bystander through collision of two vehicles—Proximate and effective cause—Findings of jury, how far inconclusive—New trial.*] The Falls Road, one of the principal streets leading out of Belfast to the west, and along which the electric tramway passes, is intersected at right angles by Northumberland Street and Albert Street. *Q.* was driving a horse and trap along Northumberland Street, intending to cross the Falls Road into Albert Street. A tramcar coming down Falls Road collided with the trap, and caused it to swerve round. *Q.* was thrown out and struck the plaintiff, who was standing on the pavement, and had in no way contributed to the accident. In an action against the defendants, as owners of the tramways, the jury found—(1) that *Q.*'s trap was negligently driven on the day of the accident; (2) they were unable to agree as to whether the motorman was negligent in driving and managing his car. A third question was put to them—(3) "if there was negligence on the part both of *Q.* and the motorman, was the real and effective cause of the collision (*a*) the negligence of *Q.*? or (*b*) the negligence of the motorman?" The jury answered—3 (*a*) "Yes," and 3 (*b*) "No." The Judge entered judgment for the defendants. On a motion for a new trial:—*Held*, by the Court of King's Bench, that the findings of the jury attributed the entire blame in relation to the accident to *Q.*, and that the Judge was therefore right in entering judgment for the defendants. *Held*, by the majority of the Court of Appeal (Sir Samuel Walker, C., and FitzGibbon, L.J.; *dissentiente* Holmes, L.J.), that the findings of the jury, read with their disagreement on question 2, did not supply all the materials necessary for finally determining the questions in dispute, and that, to relieve the defendants from liability, it was not enough to show that *Q.* was guilty of negligence directly causing the injury, but that the plaintiff was entitled to a verdict against the defendants if the motorman could, by reasonable skill and care, have avoided the collision; and, that inasmuch as this question was not left to the jury, although so required by plaintiff's counsel, there must be a new trial. *Devlin* v. *Corporation of Belfast* - - - K. B. 437; APP. 448

NEGLIGENCE—*continued.*

2. —— *Representation — Estoppel — Statement made in the course of business—Reasonable care—Insurance.*] *M'N.*, whose motor car was being repaired at the works of *M. & Co.*, communicated to *M. & Co.* his intention to effect a policy of insurance against the destruction or injury of the motor car by fire while on their premises. Thereupon *M. & Co.*, as was found by the jury at the trial, negligently, carelessly, and without due and proper care, represented to *M'N.* that they had insured the car for him, which, in fact, they had not done, in consequence of which representation *M'N.* refrained from insuring the car. The car, with other goods (which were, in fact, insured) on the premises of *M. & Co.*, was afterwards destroyed by fire, and *M. & Co.*, were paid the insurance moneys in respect of the goods actually insured:—*Held*, by the King's Bench Division and the Court of Appeal, that, on the state of facts so found, *M'N.* was entitled to recover damages from *M. & Co.* for the loss of his car. *M'Neill* v. *Millen & Co.* - - K. B. 328; APP. 339

—— Contributory negligence — Questions proper to be left to jury - - 134, 150
See CONTRIBUTORY NEGLIGENCE.

—— District Council—Contracts under Labourers Acts — Employment of solicitor — Surcharge - - - - - - 505
See AUDITOR.

NEW TRIAL—Evidence proper to be submitted to jury - - 27, 82, 355, 379, 537
See DECEIT.
FRAUD.

NOMINATION — Lives in renewable lease — Evidence—Presumption - - 617
See COVENANT TO RENEW.

NOTICE — Motion to remit — Error — Amendment - - - - - - 129
See REMITTING ACTION TO COUNTY COURT.

—— Proceedings under Bankers' Books Evidence Act, 1879 - - - - - 130
See BANKERS' BOOKS.

—— Re-hearing by Justices - - - - 18
See JUSTICES. 4.

—— Surrender—Months, whether lunar or calendar - - - - - 660, 669
See SURRENDER.

OFFENCES—Charge of district, alternatively—General conviction - - - 386
See JUSTICES. 1.

OMITTED INTEREST—Compulsory purchase
See COMPULSORY PURCHASE [310, 317

ORDER — Justices — Repair of roads — Limit of time—Definiteness - - - 389
See URBAN DISTRICT COUNCIL.

ORDERS, GENERAL — 1899 (20th January), Application of Enactments, Art. 2, Schedule - - - - - - 389
See URBAN DISTRICT COUNCIL.
—— 1905 (22nd Feb.), XXIX., Rr. 1-3 1, 341,
See SECURITY FOR COSTS. 1-3. [555

PARLIAMENT — *Franchise — Change of residence—Place of abode—Wrong description—Power to amend.*] Where a succession claim had, in the second column, under the heading "Place of Abode," "House 28–29 Belgrave Square (South), in direct succession from house 4 Clifton Terrace, Ranelagh," and in the fourth column, for the place where the property is situated, "28–29 Belgrave Square (South)":—*Held*, that the claim was good as it stood, no one having been misled; but, if not, the Revising Barrister had power to amend it. *Ladd* v. *Farrell* - - APP. 352

2. —— *Franchise — Dwelling-house — Service franchise—Part of house separately occupied as a dwelling—Representation of the People Act* (48 *Vict. c.* 3), *s.* 3.] The claimant was, along with several others, in the employment of *P.*, who carried on an extensive drapery business in Londonderry. Each of the claimants was to have a yearly salary, and board, and a room to himself, and the sole control over the room. Each of them had a key for his room, and a latch-key for the outside door. They had to reside in the rooms allotted to them, but they would not be changed. The employer did not reside on the premises. The Revising Barrister having admitted the claimants:—*Held* (by Lord O'Brien, L.C.J., and Fitz Gibbon, L.J.; *diss.* Holmes, L.J.), that there was evidence to support the finding that the employees were inhabitant occupiers, and, as such, entitled to the service franchise. *M'Daid* v. *Balmer* - APP. 345

PARTICULARS—Debtor's summons - 151
See DEBTOR'S SUMMONS.

PENALTY— Costs — Small Penalties (Ireland) Act, 1873, ss. 3, 4, 6 — Imprisonment until payment - - - 13, 18
See JUSTICES. 2, 3.

PENDING PROCEEDINGS—Comment—Contempt - - - - - - 260
See CONTEMPT.

PORT—Custom of—Discharge of cargo 578, 602
See CUSTOM OF PORT.

POSTMASTER-GENERAL — Carriage of mails—Demand—Railway Company 242
See MAILS.

PRACTICE— Bankers' Books Evidence Act — Proceedings under—Inspection—Account of stranger to action—Notice - 30
See BANKERS' BOOKS.

—— Bankruptcy—Debtor's summons—Affidavit—Particulars - - - - 151
See DEBTOR'S SUMMONS.

PRACTICE—*continued.*
—— Civil-bill appeal—Death of party—Adjournment—Continuing proceedings - 486
See CONTINUING PROCEEDINGS.

—— Contempt—Pending criminal proceedings—Comment in public speech - 260
See CONTEMPT.

—— Debtor's summons—Affidavit—Particulars
See DEBTOR'S SUMMONS [151

—— Deceit—Reckless mis-statements—Engineering contract—Evidence proper to be submitted to jury - - 27, 82, 537
See DECEIT.

—— Equitable execution - - - 235
See RECEIVER.

—— Limited administration—Grant— Trust property - - - - - 209
See ADMINISTRATION.

—— Negligence—Action for—Contributory negligence—Proper questions to be left to jury [134, 150
See CONTRIBUTORY NEGLIGENCE.

—— Negligence—Injury to third party caused by negligence of others—Proper questions to be left to jury - - - 437, 448
See NEGLIGENCE. 1.

—— Probate action—Caveator out of the jurisdiction—Security for costs - - 1
See SECURITY FOR COSTS. 1.

—— Receiver—Equitable execution—Town Commissioners—Debentures - - 235
See RECEIVER.

—— Remitting action to County Court—Breach of promise of marriage—Error in notice of motion—Amendment - - 129
See REMITTING ACTION TO COUNTY COURT.

—— Security for costs - - 1, 341, 555
See SECURITY FOR COSTS. 1, 2, 3.

—— Taxation of costs—Bankruptcy—Appeal from Local Court - - - - 109
See TAXATION OF COSTS.

—— Two testamentary papers—Grant of probate to executors named in both - 484
See EXECUTOR.

PREDECESSOR—Settlement—Settlor 400
See SUCCESSION DUTY.

PREFERENTIAL CLAIM — Bankruptcy — Rent of telephone - - - 559
See CROWN DEBT.

PRESUMPTION—Nomination of lives in renewable lease - - - - - 617
See COVENANT TO RENEW.

PRINCIPAL AND AGENT.
See AGENT.

PROBATE — Two paper writings — Grant to executors named in both - - 484
See EXECUTOR.

PUBLIC AUTHORITIES PROTECTION—Alleged fraud in contracting for public work - - - - - 27, 82, 537
See DECEIT.

PUBLICHOUSE—Eviction — Grant of license to landlord—Application by evicted tenant for new license in vicinity - 299, 309
See LICENSING ACTS. 1.

—— Surrender of part of licensed premises 474
See LICENSING ACTS. 2.

RAILWAY COMPANY—Carriage of mails—Postmaster-General—Demand - 242
See MAILS.

RATES—Buildings — Valuation — Principle of assessment - - - - - 112
See VALUATION.

RATIFICATION—Contract by alleged agent
See AGENT. 2. [462, 474

RECEIVER — *Practice — Equitable execution — Application by judgment creditor to be appointed receiver over debts due to judgment debtors — Town Commissioners — Debenture-holders.*] The defendants were Town Commissioners of Bandon. The predecessors of defendants, purporting to act under the Lighting of Towns (Ireland) Act, 1828, built gasworks, and for that purpose leased certain premises, and raised the money by the issue of debentures secured on the gasworks and income arising therefrom, in respect of which £1900 was still due for principal, and one year's interest at 6 per cent. The plaintiff having recovered judgment for £181, applied to be appointed receiver by way of equitable execution over sums due by inhabitants of the town for gas supplied by the defendants. There was no property capable of being seized under an execution, and the statutory rate of 1s. in the £ was insufficient to defray the statutory obligations of the defendants:—*Held*, affirming the decision of the King's Bench Division (Andrews and Wright, JJ.), that as the money in the receiver's hands would be liable to satisfy claims paramount to the plaintiff's debt, the application should be refused. *O'Driscoll* v. *Bandon Town Commissioners* - - - - K. B. 235

REHEARING — By Justices — Procedure—Notice - - - - - - 18
See JUSTICES. 4.

REMITTING ACTION TO COUNTY COURT—*Notice of motion erroneously framed under 5th (contract) section — Amendment.*] Where a notice of motion to remit an action for breach of promise of marriage was framed under the 5th (contract) section:—*Held*, that the Court could amend the notice so as to frame it under the 6th (tort) section. *Crooks* v. *Gibson* (*unreported*) followed *M'Carney* v. *Beatty* - - - K. B. 129

RENEWABLE LEASE—Limited time for renewal—Nomination of lives—Evidence—Presumption - - - - - 617
See COVENANT TO RENEW.

RENT—Telephone—Bankruptcy - - 559
See CROWN DEBT.

REPAIR OF ROADS—Urban District Council—Powers - - - - - 389
See URBAN DISTRICT COUNCIL.

REPEAL OF STATUTE—34 & 35 Vict. c. 112, s. 13—3 Edw. 7, c. 44, s. 12 502
See BRASS.

REPRESENTATIONS — Insurance of motor car pending repairs - - 328, 339
See NEGLIGENCE. 2.

—— Proviso as to verifying—Engineering contract
See DECEIT. [27, 82, 537

REPUDIATION—Promise of extended lease—Sale—Suppression - - 355, 379
See FRAUD.

RESCISSION—Contract—Principal and agent
See AGENT. 1. [212, 227

RESIDENCE—Change of—Succession claim—Amendment - - - - - 352
See PARLIAMENT. 1.

—— Security for costs - - - 1, 341, 555
See SECURITY FOR COSTS. 1, 2, 3.

REVENUE—Succession duty—Settlor - 400
See SUCCESSION DUTY.

ROAD—Repair of—Entry to obtain materials—Powers of Urban District Council — Justices' order—Definiteness - 389
See URBAN DISTRICT COUNCIL.

RURAL DISTRICT COUNCIL — Contracts under Labourers Acts—Employment of solicitors—Surcharge - - 505
See AUDITOR.

SALE.
See VENDOR AND PURCHASER.

SATURDAY—Time for closing publichouse—Early-closing license - - - 564
See EARLY CLOSING.

SECURITY FOR COSTS—*Defendant caveator resident out of the jurisdiction—R. S. C.*, 1905, *Ord. XXIX., Rr.* 1–3.] A next-of-kin caveator resident abroad may, in a proper case, be ordered to give security for costs, but this cannot be required as a matter of right. Even in a Common Law action there is no inflexible rule that a plaintiff resident abroad must give security for costs. *Ward* v. *Skeehan* - - K. B. (PROB.) 1

2. —— *Plaintiff resident in England—Affidavit disclosing good cause of action—Gen. Ord. XXIX., R.* 2.] Defendant was bailee for hire of a valuable horse, the property of the plaintiff, who was resident in England, and had no other property in Ireland. On the 1st October, 1906, the defendant sent the horse to be shod to the farrier whom he usually employed. The next day the horse was

SECURITY FOR COSTS—*continued.*
lame, and the defendant sent for the farrier, who said that the horse would be well in a day or two. The lameness passed off; but, on the 12th October, the horse developed symptoms of tetanus. The defendant telegraphed to the plaintiff, and the plaintiff telegraphed to a veterinary surgeon, who attended to the horse, but it died from tetanus. In an action by the plaintiff against the defendant for negligence:—*Held*, by the Lord Chancellor and Holmes, L.J. (*diss.* FitzGibbon, L.J.), that as *prima facie* a good cause of action had been shown by the affidavits, the plaintiff should not be ordered to give security for costs. *Held*, *per* FitzGibbon, L.J., that, without definitely pronouncing upon the merits of the action, the affidavits did not disclose a sufficiently clear case against the defendant to deprive him of his right to security for costs, having regard to the decision of the Court of Appeal in *Watson* v. *Porter* ([1907] 2 I. R. 341) and its uniform practice in remitting cases to Quarter Sessions. *Burke* v. *Irwin* - - APP. 555

3. —— *Seafaring man—Residence in England—Ord. XXIX., Rr.* 1 *and* 2.] The plaintiff in an action for alleged slander was a sea captain, who resided, when not absent on a voyage, in a house in Liverpool, the property of his mother-in-law, for which he paid no rent. The alleged slander arose out of a dispute between the plaintiff and the owners of his former ship, from which he had been dismissed without payment of the balance of his wages as captain; and a second action was pending between the plaintiff and the owners of the ship (of whom the present defendant was one), in which the plaintiff sought to recover payment of such wages:—*Held*, by the Court of Appeal (reversing the decision of the King's Bench Division), that the defendant was entitled to require the plaintiff to give security for costs of the action. *Graham* v. *Wray* (35 Ir. L. T. R. 237) distinguished. *Watson* v. *Porter* APP. 341

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SERVICE—Summons—Petty Sessions—Served in county other than and not adjoining county where issued - - - 160
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SHIP—Discharge of cargo—Bombay wheat—Custom of Port of Belfast—"Hoisting" or "whipping" - - 578, 602
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SOLICITOR—Employment by Rural District Council—Contracts for Labourers' Cottages—Surcharge - - - 505
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6 & 7 Wm. 4, c. 116—Grand Juries, s. 162 389
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15 & 16 Vict. c. 63—Tenement Valuation 112
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16 & 17 Vict. c. 51—Succession Duty, ss. 2, 10
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34 & 35 Vict. c. 112—Prevention of Crimes, s. 13 - - - - - 502
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36 & 37 Vict. c. 82—Small Penalties, ss. 3, 4, 6
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37 & 38 Vict. c. 69—Licensing, s. 2 - 564
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44 & 45 Vict. c. 41—Conveyancing and Law of Property, s. 30 - - - 209
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60 & 61 Vict. c. 37—Workmen's Compensation, s. 1 - - - - - - 104
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3 Edw. 7, c. 44—General Dealers, s. 12 502
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6 Edw. 7, c. 39—Intoxicating Liquors, s. 2
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SUCCESSION CLAIM — Misdescription — Amendment - - - - - 352
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SUCCESSION DUTY—*Revenue—Predecessor—Settlor — Marriage portion — Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 10.] A step-daughter, who was contemplating marriage, was possessed of forty-five shares in the National Bank, which had been presented to her by her step-father. These shares, at the request of the step-father, who told her that he had left her much more than their value, she handed over to her brother, and the step-father gave her a "marriage portion" of £5000, which was put in settlement. The step-father died shortly after the marriage, and by his will, which was made some months before the marriage, he left the step-daughter a legacy of £5000. In a former suit in Equity the step-daughter and her husband had established that this legacy was not adeemed by the marriage portion of £5000, and, upon the death of her husband, the Inland Revenue Commissioners claimed from the eldest son of the marriage, who was the successor, succession duty, under the Succession Duty Act, 1853, sections 2, 10, at the rate of ten per cent. in respect of the £5000 put in settlement, upon the ground that the predecessor was the step-father, a stranger in blood. The eldest son contended that it was his mother who settled the £5000, and that she was the predecesssor, in which event succession duty at the rate of 1 per cent., and no more, would be payable:—*Held*, that, before and at the time of the settlement, the £5000 put in settlement belonged to the step-father and not to the step-daughter, and that he was the predecessor. *Held*, also (*per* Gibson and Kenny JJ.), that, notwithstanding the use of the word "portion" in the settlement, the step-father, and not the step-daughter, was to be deemed the settlor. *Ward* v. *Dyas* (Ll & G. *temp.* Sugden, 177) observed upon and distinguished. *Attorney-General* v. *Biggs* [K. B. 400

SUMMONS—Debtor's—Affidavit—Particulars
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SUMMONS—*continued.*
—— Issued by county magistrate — Whether capable of effective service in another county not adjoining that where issued
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SURRENDER—*Lease—Term from 1st November—Power to surrender at end of year on giving three months' notice beforehand—Notice served on 1st August of intention to surrender on 1st November following—Time—Months, whether lunar or calendar.*] By agreement in writing, dated the 2nd October, 1902, the defendant agreed to let to the plaintiff certain premises in the town of Dundalk for 500 years from the 1st November, 1902, at the yearly rent of £100, payable half-yearly in advance on the 1st May and 1st November in each year, with a proviso that the plaintiff should be at liberty to surrender the premises at the end of the first two years on giving three months' notice beforehand of his intention to do so. On the 30th July the plaintiff sent to the defendant by registered post a notice of his intention to surrender on the 1st November, 1904. The letter was not delivered to the defendant until the 1st August:—*Held*, by the King's Bench Division (Lord O'Brien, L.C.J., and Johnson, J.; *diss.* Wright, J.) and by the Court of Appeal, that whether the word "months" was to be read as calendar or as lunar months, a notice served on the 1st August, 1904, of intention to surrender on the 1st November following, was good. *Wilkins* v. *M'Ginity* - - - K.B. 660; APP. 669
—— Part of licensed premises - - - 474
See LICENSING ACTS. 2.

TAXATION OF COSTS — *Practice — Local Bankruptcy Court—Appeal from.*] Where, on the determination of an appeal from an order of a Local Bankruptcy Court, the Taxing Master is directed to tax the costs of and incidental to the proceedings in the Court below and of the appeal, it is the duty of the Taxing Master to tax such items as relate to business transacted in the Local Bankruptcy Court, and such items as relate to the appeal, according to the scale of fees respectively applicable to such items, and it is not necessary that the former items should be referred to the Local Registrar for taxation. *In re Hanafin* - - - - - APP. 109

TELEPHONE—Rent of—Bankruptcy - 559
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THIRD PARTY—Personal injuries caused by joint negligence of others - 437, 448
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TIME—Computation—Months, whether lunar or calendar - - - - 660, 669
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TORT—Tortious act of stranger—Act having no relation to employment - - 104
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TOWN COMMISSIONERS—Gasworks—Debentures—Equitable execution - 235
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TRESPASS IN PURSUIT OF GAME—Alternative charges—Conviction - 386
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TRUST—Declaration of—Deposit receipt 416, [428
See GIFT.

TRUSTEE—Death of—Limited administration to trust property - - - 209
See ADMINISTRATION.

URBAN DISTRICT COUNCIL — *Local Government—Right to take gravel, &c.—Transfer of powers — Justices' order—Grand Jury Act*, 1836 (6 & 7 *Wm.* 4, *c.* 116), *s.* 162 — *Application of Enactments Order*, 1899.] Sect. 162 of the Grand Jury Act, 1836, as adapted by the Local Government (Adaptation of Irish Enactments) Order, 1899, runs as follows:—"Every county surveyor and every contractor for any work to be executed in pursuance of a resolution of a county council, shall have power and authority to dig for, raise and carry away, in or out of any lands, . . . any gravel, stones, sand, or other materials," &c.; and the section afterwards provides that it shall not be lawful for any such contractor or surveyor to enter any such land for any such purpose against the will of the occupiers thereof without the previous order of a Justice of the Peace:—*Held*, that, notwithstanding the omission of the words "urban district council" from the section, as adapted, the powers exercisable under the section by the county surveyor and contractor, under the Grand Jury system, are transferred to urban district councils undertaking the maintenance of the roads in their districts. *Held*, also, that, notwithstanding the specific reference in the section, as adapted, to county surveyor and contractor, such powers are exercisable by urban district councils in their corporate capacities. *Held*, also, that an order under the foregoing section, limited "during the period of three years, should they (the urban district council) so long continue as aforesaid, or for such portion of said period as they shall so continue"—being a reference to the period for which the district council had undertaken to keep the roads in repair—is not bad for indefiniteness. *The King* (*Brady*) v. *Justices of Co. Cavan* - - - - - - K. B. 389

VALUATION—*Buildings—Principle of assessment — Cost of construction — Evidence of letting value*—15 & 16 *Vict. c.* 63.] In valuing premises consisting of a dwellinghouse, a percentage on the actual cost of construction cannot properly be taken as the sole basis of assessment, when there is evidence of letting value and of expenses of repairs, insurance, and up-keep of the premises borne by the owner. *Fletcher* v. *Commissioner of Valuation* - - - - - - K. B. 112

VENDOR AND PURCHASER — Sale of leasehold—Fraudulent suppression as to alleged extension - - 355, 379
See FRAUD.

"WHIPPING"—Discharge of cargo—Custom of port of Belfast - - 578, 602
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WILL—Attestation—Signatures of witnesses in body of will - - - - - 480
See ATTESTATION OF WILL.

—— Two testamentary papers—Executors—Grant of probate - - - - - 484
See EXECUTOR.

WITNESS—Will—Signature in body of instrument - - - - - - 480
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WORDS — "Penalty" — 36 & 37 Vict. c. 82, s. 4 - - - - - - 13, 18
See JUSTICES. 2, 3.

—— "Subscribe"—1 Vict. c. 26, s. 9 - 480
See ATTESTATION OF WILL.

WORKMAN—*Employer—Accident arising out of the employment — Tortious act of a stranger causing injury — Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1.] *A* was in the employment of *B*, a contractor, as foreman of sewage works. Certain pipes which had been laid in the street in the course of the work were wantonly broken. *B* directed *A* to protect the pipes, and whilst *A* was so engaged further damage was done, for which *A*, under *B*'s direction, demanded payment from the wrong-doers. This led to an altercation, in the course of which *B* was struck and fell, and *A*, on going to his rescue, was stabbed and died:—*Held*, that the death of *A* was not caused by an accident arising out of and in the course of his employment, within the meaning of the Workmen's Compensation Act, 1897, section 1. *Collins v. Collins* - - - - APP. 104

THE END.

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